

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1140

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

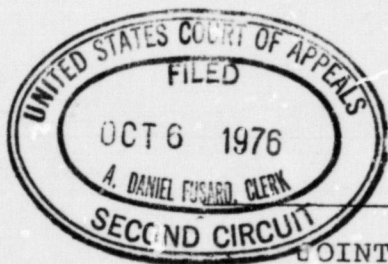
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DOCKET NO. 76-1140

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

V.

DAVID N. BUBAR, ET AL.
DEFENDANT-APPELLANT



JOINT APPENDIX TO BRIEF

PART FOUR OF FOUR

PAGINATION AS IN ORIGINAL COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

----- -X
UNITED STATES OF AMERICA,

vs.

CHARLES D. MOELLER, et al.,

Defendants.

Criminal N-75-59

New Haven, Connecticut
January 27, 1976

B e f o r e :

Hon. JON O. NEWMAN, U.S.D.J.

(In the absence of the jury.)

THE COURT: Gentlemen, the note from the jury this morning says, "Request to review elements of Count Four."

MR. CRAIG: Would you be interested in my reaction?

THE COURT: I don't think there are too many alternatives, but I will hear you.

MR. CRAIG: The elements of Count Four be read to the jury and only the elements of Count Four. It's a very specific request. It does not ask for the contentions of the government. It just specifically asks for the elements of Count Four.

THE COURT: I will probably leave it to them. If they had said, "We want you to state the elements," I would think I would agree with you. That they just want it one, two, three. When they say review them, I think that means in the sense of explain them, but I wouldn't presume that.

I will try to find out from the foreman. I will tell them those are the choices, and I will read the three. If they indicate that's enough, fine. If they want the review of them, then I will tell them the explanation that I gave.

All right, bring them in.

(Jury entered courtroom at 10:35 a.m.)

THE COURT: Good morning, ladies and gentlemen. I have your note which reads, "Request to review elements of Count Four."

Now, there are two ways I could respond to that, and I think I will indicate the choices and see if perhaps the

1 foreman -- was this note written by the foreman?

2 THE FOREMAN: Yes.

3 THE COURT: Perhaps you can tell me which you want.
4 I can -- if all you want is the actual listing of the elements,
5 there is one sentence for each, and I can simply list them, if
6 that's what you want.

7 There was also some explanation, which takes about
8 three or four pages. So if it's a question of just listing them,
9 I will do that. If you want the fuller explanation, I will do
10 that. If you can advise me which you want.

11 THE FOREMAN: The explanation.

12 THE COURT: There are three elements of the crime charged
13 in Count Four, each of which the government must prove beyond a
14 reasonable doubt before there can be a conviction on that count.
15 The first element is that a defendant on or about March 1, 1975,
16 did possess a firearm within the meaning of the federal statute.
17 The second element is that his possession was knowing: that is,
18 that he knew that what he possessed was a firearm. The third
19 element is that at the time of possession, the firearm was not
20 registered to him in the National Firearms Registration and
21 Transfer Record.

22 With respect to the first element -- possession of a
23 firearm -- the statute includes a definition of what constitutes
24 a firearm. Included in that definition is the term "a
25 destructive device," and "destructive device" is defined to mean

1 "any explosive bomb." In this case the government contends that
2 the assembled device consisting of barrels of gasoline, sticks of
3 dynamite under them, detonating cord running to the dynamite,
4 and a timing device to activate the detonating cord is the destruc-
5 tive device or firearm that was possessed by the defendants.
6 While dynamite alone does not constitute a destructive device
7 within the meaning of this statute, if you find that there was
8 in Plant 4 on the night of March 1 an assembled device of
9 dynamite, detonating cord, gasoline, and a timing device so
10 constructed as to detonate the dynamite and ignite the gasoline, and
11 cause an explosion and fire, you would be entitled to conclude
12 that this device was a destructive device or firearm within
13 the meaning of this statute. I should point out that this is
14 the only device possession of which can be considered in
15 connection with Count Four. There was some testimony about a
16 pistol, but I instruct you that possession of that firearm, if
17 it occurred, is not sufficient to prove the offense charged in
18 Count Four.

19 The possession required for this first element need not
20 be solely the possession of one person. Two or more persons may
21 jointly share possession of an item, so long as each has direct
22 physical control over the item.

23 As to the second element, knowing possession simply
24 means that the defendant knows that what he possesses is a
25 destructive device. It is not necessary that he know that the

1 device comes within the statutory definition of federal law.
2 Nor is there any requirement that a defendant know that the
3 device must be registered. But there must be evidence that
4 proves beyond a reasonable doubt that he knew what was possessed
5 was a destructive device, in this case, a device capable of
6 causing explosion and fire.

7 The third element is simply the fact that the device
8 was not registered. You will recall there are in evidence
9 certificates showing that a search was made of the National
10 Firearms Registration and Transfer Record and that this search
11 disclosed no records of a destructive device registered to any
12 of the defendants. You are entitled, though not required, to
13 conclude that these certificates establish the third element of
14 this offense.

15 Again as with the other substantive offenses, you
16 will have to give consideration to the distinction between
17 principals and aiders or abettors. The government's evidence,
18 if you accept it, would tend to show that the destructive
19 device was possessed in Plant 4 by Dennis and Michael Tiche,
20 along with John Shaw. The government has also offered evidence
21 to prove that each of the other defendants took some action to
22 aid or abet their possession of the device. I have previously
23 explained what sort of action and state of mind is necessary to
24 constitute someone as an aider or abettor. Let me point out that
25 as to this count, unlike Count 3, the action of any defendant

1 whom you find was in the plant and who participated in the
2 abduction of the guards can be considered by you in deciding
3 whether a defendant acted so as to aid and abet the commission
4 of the offense charged in Count 4. No defendant can be convicted
5 as an aider or abettor under Count 4 unless you find beyond a
6 reasonable doubt that he knew about the destructive device and
7 intended by his action to participate with others in their
8 possession of that device.

9 Again, I remind you in referring to any of the
10 government's contentions I don't mean in any way to imply that
11 they are established. As you know, they are disputed by the
12 defendants and whether they are established or not are issues
13 of fact for you. I simply allude to them by way of explanation
14 of what the necessary elements are.

15 All right, jury may be excused.

16 (Jury left courtroom at 10:45 a.m.)

17 MR. SAGARIN: Your Honor, I would like to except to the
18 Court's charge to the jury and the fact that for the reason that
19 it restated some of the evidence, as we did before, but, again,
20 particularly since the jury appears to be focusing on Count Four,
21 I think the Court's reference to the certificates in evidence
22 are particularly misleading, particularly since the Court doesn't
23 point out to the jury the factual issue we made in the motion for
24 judgment of acquittal, which is that the certificates only point
25 to a nonregistration as of November date, and not of a March

1 date, and there is no evidence in the case to indicate what that
2 certificate means. The jury is simply left to guess.

3 THE COURT: I understand the point that was made to
4 me, but no argument was made to the jury that in any way
5 suggested that their fact finding ought to center on that and so --

6 MR. SAGARIN: The fact that counsel doesn't argue doesn't
7 mean it's not a factual issue in the case. One of the factual
8 issues in the case is whether those registrations are sufficient
9 to make a finding that --

10 THE COURT: That may be. I have told them only that
11 they are entitled to make the conclusion, but don't have to. I
12 can't very well frame for them factual contentions that counsel
13 haven't thought sufficiently plausible to make.

14 MR. SAGARIN: I don't think it's not a question of
15 sufficiently plausible. I think there are a number of things
16 you have to talk about in summation in a limited time, but
17 when they are focusing on that count, I think the fact should be
18 pointed out to them, and I ask the Court so to instruct the jury.

19 THE COURT: I don't think I can make to them a factual
20 contention on behalf of the defendants that counsel hasn't made.
21 I didn't in any of the initial charges. There was never any
22 exception to that initially, and I am certainly not going to at
23 this late stage reinject that issue at this point.

24 MR. CLIFFORD: Your Honor's recollection may be
25 different than mine, but I thought that we had excepted to not

1 indicating that the date of November 1, 1974, certainly on the
2 judgment of acquittal.

3 THE COURT: There is no doubt you moved for judgment
4 of acquittal. Your view was that the evidence was not sufficient.
5 I rejected that claim. When I charged initially on Count Four,
6 I don't believe anybody in any way urged me, either initially,
7 or excepted afterwards, on the grounds that I had not sufficiently
8 put to them the evidentiary claim that you wanted to make to me.

9 MR. CLIFFORD: We are now that they are focusing on
10 that particular count. On behalf of Michael Tiche, I adopt
11 the arguments of Mr. Sagarin and would urge the Court to so
12 instruct the jury.

13 MR. BOWMAN: Your Honor, I join with Mr. Clifford and
14 Mr. Sagarin on the certificates issue. I also except to your
15 Honor's instruction to the jury specifically beginning with the
16 government's evidence portion of your instruction. I think that
17 your explanation was a full explanation of the essential elements
18 of Count Four, and it fully satisfied their request. However,
19 I believe that for your Honor to again go into the contentions of
20 the government was improper, and I except to that.

21 MR. CLIFFORD: I have one further remark. Your Honor,
22 I except to the Court's charge wherein you associated the name
23 Michael Tiche with Dennis Tiche, who has been convicted by
24 this jury. I think that joint reference in charge four is a
25 clear invitation to the jury to convict Michael on Count Four.

1 At least the association of that name at this juncture in the
2 trial after a verdict has been returned against Dennis, I
3 think that that is improper. I would except to that.

4 THE COURT: I am not going to try to, I think there
5 is an absolute dilemma about that. If I say the government
6 claims that Michael Tiche was the possessor, that's going to
7 sound like I am suggesting that he is the sole possessor and
8 Dennis wasn't even there. So I can't say that. I have told
9 them repeatedly they are to give individual attention to the
10 cases. They have demonstrated over eight days that they are
11 doing that, and so I don't think that I ought to in any way
12 alter that reference to the claim. If I leave Dennis out, it
13 sounds worse for Michael..

14 MR. CLIFFORD: That's the dilemma in giving the jury
15 the government's contention, because at this stage of the game,
16 I think it's a no win proposition. I don't think you can win
17 either way on that, and the only safe way to handle that is
18 not to give them the government's contention at all, which is
19 what we requested in the beginning, just merely the elements.

20 THE COURT: There still remains the obligation to be
21 clear with them, and I have endeavored to satisfy that, and I
22 don't think I have misstated the law to them on this point.
23 But your point is on the record.

24 (Recess taken.)
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1 (In the absence of the jury.)

2 THE COURT: Gentlemen, there is a note from the jury
3 which reads: "If we find a defendant abducted the guards
4 in Plant No. 4, must" -- underlined -- "we find that this aided
5 and abetted the possession of the firearm?"

6 It seems pretty easy.

7 MR. BOWMAN: Your Honor, that question is exactly
8 what the jury must find. In other words, the question is not
9 only if they find that someone participated in the abduction,
10 then they must also find that they aid and abet in the
11 possession of the destructive device. They must make that jump,
12 and I think that by answering that question, the Court is
13 usurping the jury's function. Or I would alternatively argue
14 that for the Court to say to them, "Yes" --

15 THE COURT: I was thinking of a "no".

16 MR. BOWMAN: That's what I was thinking of. That's
17 my first position. But I didn't know if you wanted to hear
18 argument before or --

19 THE COURT: I thought I would answer it no. I am
20 not sure that a one-word answer is appropriate here, but I will
21 certainly indicate that the answer to that question is no. If a
22 defendant abducted the guard, they do not have to find that this
23 aided and abetted.

24 MR. CRAIG: This is precisely the kind of question that
25 I was worried about yesterday as a result of your instruction

1 inviting more specific questions about evidence and the law.
2 I do think it's a comment on the evidence by your Honor to
3 respond to that question, and consequently, my first position
4 is somewhat different from Mr. Bowman's, I would request no
5 response whatsoever be given to that kind of question, because
6 I think it moves into the jury's province.

7 My second position is that the answer is no, with
8 no elaboration, because I think that is, in fact, the correct
9 answer. If there is an answer to be given on that. I am
10 worried about the kind of elaboration your Honor might give as
11 to what kind of other contentions the government may make with
12 respect to the abduction that they could find satisfied aiding
13 and abetting, so my first position is that I don't think your
14 Honor should answer that note, and if you do answer the note, I
15 think it should be a one-word answer, no.

16 MR. NEIGHER: The position of defendant Ronald Betres
17 is the only appropriate answer to that question for the jury.
18 is one-word answer, no.

19 THE COURT: All right.

20 (Jury entered courtroom.)

21 THE COURT: Ladies and gentlemen, I have your note
22 which reads: "If we find a defendant abducted the guards in
23 Plant No. 4, must" -- underlined -- "must we find that this aided
24 and abetted the possession of the firearm?"

25 The answer to that question is clearly no. You don't

1 have to find that the abduction of the guards aided and abetted
2 the possession of the firearm.

3 I don't mean to go back over everything I said, but just
4 so I put in context the reason why I say no as an answer to that
5 question, I have indicated to you both what the elements of
6 the substantive offense are for Count Four and also what the
7 aiding and abetting standards are, and I have referred to the
8 fact that aiding and abetting requires some action that
9 participates in someone else's commission of a crime, that aids
10 that crime, some action by which a person makes that crime his
11 own and joins in it, aids it, advances it, makes it his own.
12 It's up to you to determine whether any defendant -- first, to
13 determine whether he did do certain things, as a matter of fact,
14 and then to determine whether that action did aid and abet
15 anyone else's possession, as I have used those words "aid" and
16 "abet", but clearly you don't have to conclude that because a
17 person did one particular act, such as the one you have referred
18 to here, the abducting of the guards, that that necessarily
19 constitutes aiding and abetting. It doesn't necessarily
20 constitute aiding and abetting. Whether a person aided and
21 abetted depends on his state of mind and his action and whether
22 both his intent and his action met the standards of aiding and
23 abetting that I have indicated to you, but clearly when you put it
24 this way, "Must we find that abducting a guard aided and
25 abetted?", the answer is no. All right.

1 (Jury left courtroom at 12:10 p.m.)

2 MR. CRAIG: I take exception on the ground that I
3 stated before, before you gave the instruction.

4 THE COURT: I understand you prefer that not be
5 said, but is there any claim that what was said is not a correct
6 statement of the law?

7 MR. CRAIG: No, your Honor.

8 Are you waiting for a response from us?

9 THE COURT: I didn't know if I was getting one or not.
10 I saw some consultation, and I didn't know if that meant you
11 had something more to say or not. No, I think --

12 MR. CRAIG: The basis for my objection, your Honor,
13 to your instruction, I set forth fairly completely before you
14 gave it. That still is the basis for my objection.

15 THE COURT: All right. We will take a short recess.

16 (Recess taken.)

17 (Jury entered courtroom at 5:15 p.m.)

18 THE COURT: Ladies and gentlemen, I understand from
19 your note that you wish to adjourn for the evening. Again, please
20 adhere to the instructions I have given you each evening about not
21 discussing the case with anyone, nor reading any newspaper accounts,
22 any television or radio reports, if there should be any about this
23 case.

24 When you resume tomorrow, please wait until all twelve
25 are assembled until you begin your deliberations. Jury may be

1 excused until tomorrow morning at ten o'clock.

2 (Jury excused at 5:15 p.m.)

3 THE COURT: I should put on the record at about four
4 o'clock there was a note submitted by a juror requesting to
5 suspend for the day. At that time, I discussed the note with
6 counsel in chambers. They indicated to me that their preference
7 was to let the jury go home in view of that request. I thought
8 the request was not sufficiently well-founded to justify an
9 early adjournment, so I simply wrote on the back of the note
10 that it was rejected and the not -- and that response went
11 back to the jury, and that's why they stayed until now, a little
12 after five o'clock.

13 All right, court adjourned.

14 (Court adjourned at 5:16 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

-----X
UNITED STATES OF AMERICA,

vs.

CHARLES D. MOELLER, et al.,

Defendants.
-----X

Criminal N-75-59

New Haven, Connecticut
January 28, 1976

B e f o r e:

Hon. JON O. NEWMAN, U.S.D.J.

SANDERS, GALE & RUSSELL
CERTIFIED STENOGRAPHIC REPORTERS

750 MAIN STREET
HARTFORD, CONNECTICUT

141 CHURCH STREET
NEW HAVEN, CONNECTICUT

(In the absence of the jury.)

THE COURT: Gentlemen, one of the jurors called in this morning, or more accurately, his wife called in, to report that he is ill. She says it appears to be just, hopefully, a temporary bout with the flu and, hopefully, he will be here tomorrow, so I would imagine we have no alternative but to send the jury home. Unless I hear any suggestion to the contrary, that's what I will do. I think it was Mr. Wishnafski.

Is that the preference?

MR. CRAIG: Yes, sir.

Jury entered courtroom at 10:30 a.m.

THE COURT: Good morning, ladies and gentlemen. As you no doubt have become aware, one of the jurors is not here today. He reports that he has what hopefully will be a temporary illness, and I expect he will be back tomorrow, so the result is you have the day off. I think the way we will leave it is that we will try to get a current health report late in the day so that if for any reason we are not in session tomorrow, we can tell you before you make the trip in, so we will try to get word to you late this afternoon, hopefully, to confirm we are in session tomorrow.

So again please continue to abide the instructions I have given you not to discuss the case with anyone and not to look at any newspaper articles, television, radio reports, or anything of the sort. It's unfortunate there has to be an

1 interruption, but, obviously, it's beyond anyone's control, so
2 the jury may be excused, hopefully, to resume at ten o'clock
3 tomorrow morning, and we will advise you at the end of the day
4 whether that schedule stands.

5 All right.

6 (Jury excused at 10:31 p.m.)

7 THE COURT: Counsel in the pending case, if we learn
8 this afternoon that the juror is still unavailable tomorrow,
9 obviously, it would help this jury if we could tell them this
10 evening rather than have them in, so I want to find out whether
11 there is any objection to a second day's delay in the event
12 his health does not permit his return tomorrow?

13 MR. SAGARIN: No objection.

14 MR. CRAIG: No objection.

15 THE COURT: All right.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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:
UNITED STATES OF AMERICA,
:
vs.
:
CHARLES D. MOELLER, et al.,
:
Defendants.
:
----- -X

Criminal N-75-59

New Haven, Connecticut
January 29, 1976

B e f o r e:

Hon. JON O. NEWMAN, U.S.D.J.

SANDERS, GALE & RUSSELL
CERTIFIED STENOGRAPHIC REPORTERS

750 MAIN STREET
HARTFORD, CONNECTICUT

141 CHURCH STREET
NEW HAVEN, CONNECTICUT

1 (In the absence of the jury, 12:35 p.m.)

2 THE COURT: Gentlemen, there is a note from the jury
3 which reads as follows: "We have reached a decision on Counts One
4 and Two on several cases, but we are deadlocked on Counts Three
5 and Four with respect to these cases. Would you have any
6 instructions?"

7 So that you can comment, if you wish to, in light of
8 a -- in light of my initial thinking on this, it would be to
9 suggest that they report the verdicts they have reached, and
10 then to give them what I suppose could fairly be called a
11 modified Allen instruction with respect to matters as to which
12 they report that they are deadlocked.

13 MR. CRAIG: The only danger that I see in that, that
14 means they are considering individual defendants piecemeal,
15 and I would request that, at least with respect to my defendant
16 -- that they come in with verdicts on all four counts at the
17 same time.

18 THE COURT: I don't know that there is any requirement
19 that they do that, nor any way I can tell them that's what they
20 must do. In fact, I told them originally that they were not to
21 let their verdicts on any one count influence their verdicts on
22 any other count. So I don't know how I can now tell them not
23 to return a verdict on a count until they have reached a verdict
24 on some other count.

25 MR. CRAIG: My interpretation of that instruction, your

1 Honor, was that they could return their verdicts piecemeal on
2 individual defendants, not on individual counts. I would --

3 THE COURT: That was as to reporting. I am referring
4 to the usual instruction as to deliberation. I tell them, these
5 are separate counts and separate cases. Now, you want me to
6 tell them it's not so.

7 MR. CRAIG: I think there are separate cases --

8 THE COURT: And separate counts.

9 MR. CRAIG: I would request my case be considered as
10 a whole, four counts being contained in that case.

11 THE COURT: Well, that's contrary to what I told them
12 in the full charge, and I think it's contrary to the law. I
13 don't know of any rule that a jury is supposed to be told to think
14 of all the counts as a bundle and resolve them. I don't think
15 that's the law at all. I think the law is exactly the opposite.

16 MR. CRAIG: I am not making that argument. I am
17 arguing I am entitled to a deliberation of my defendant as a
18 whole. I think there is law that a jury can come out with
19 verdicts piecemeal on individual defendants when there is
20 a multiple defendant trial. I am not aware of any law where
21 verdicts are brought in on Count One and there is a deadlock
22 on Count--

23 THE COURT: There is nothing unusual about that. I
24 don't know of any law that permits me to tell them they can't do
25 it that way. That's what troubles me about your request.

1 MR. CRAIG: That's my request.

2 THE COURT: Is there law?

3 MR. CRAIG: They are to be viewed individually
4 rather -- they are to be viewed as a whole rather than individually
5 with respect to the court counts, rather than having piecemeal
6 verdicts on the individual counts, that's my request.

7 THE COURT: Well, I don't know of any authority for
8 that. I am reasonably sure that's contrary to the law, so I
9 don't see how I could give them that instruction. I think if
10 I gave that instruction, and they then came back, for example, and
11 -- supposing they convicted your client, then, on two counts
12 and acquitted on two, I think if I gave them the instruction
13 you want, you would be able to complain to an appellate court,
14 you might be estopped because of the request, but barring that
15 point, I think there would be a good claim of error that I
16 had forced that jury into a joint consideration of counts, which
17 might have contributed to a compromise, and thereby brought about
18 an unlawful consideration of what are separate allegations.

19 That's what I think the error would be, and that's why
20 I am not going to do it that way, even when requested. I don't
21 think any defendant is entitled to a wrong statement of the law.

22 MR. CRAIG: My only response, your Honor, is that I
23 think my defense is significantly different from the defense
24 presented by other defendants in this case, and I think that my
25 defendant should be considered applicable to all four counts

1 and should be applied to all four counts.

2 THE COURT: That may be. You have argued that to them,
3 and each time they consider a count, they may well want to
4 consider your defense.

5 MR. CRAIG: I made my argument.

6 THE COURT: All right.

7 MR. SAGARIN: I would strongly object to the Court
8 accepting piecemeal verdicts if it intends to give an Allen
9 charge, an Allen type charge, on the remaining two counts.
10 The Allen charge, depending on how it's given -- there is always
11 somewhat psychologically coercive -- but after the jury has made
12 a return in court and probably polled on certain findings, to
13 then give them an Allen charge is doubly coercive, so if the
14 Court were going to accept the verdicts and declare a mistrial
15 on the other two counts, I could understand it and I would so
16 move, but if the Court is going to give them an Allen charge on
17 the last two counts, then I strongly oppose that and ask that
18 the jury be advised that if you are going to give them an Allen
19 charge, give them before any verdicts are returned, but to
20 accept the verdicts and then give an Allen charge, I think, would
21 be doubly coercive, particularly in view of the fact of the
22 length of time that the jury has already deliberated, particularly
23 in view of the fact that it's been almost four weeks since I last
24 summed up, and it's been probably six weeks since any evidence
25 in the defendant Betres case came in, I would ask that, in view

1 of that, and the deadlock reported, at least as to the last two
2 counts, a mistrial will be declared and verdicts be accepted on
3 the other counts.

4 The other problem, of course, with the Court's general
5 Allen charge is that the jury indicates that with respect to some
6 counts, they are deadlocked. They say, "We have reached a
7 decision with respect to some defendants on some counts, and
8 we are deadlocked with respect to some of those defendants on
9 some counts." They have not indicated they are deadlocked with
10 respect to all defendants on all counts. And it would indicate
11 to me that the Allen charge the Court is going to give may
12 coerce them into making findings on some defendants that they are
13 not deadlocked on or just haven't made any findings, and I
14 would oppose that.

15 MR. NEIGHER: May I inquire as to the language of
16 the note, does it say that as to those defendants that they
17 have reached verdicts on Counts One and Two, as to those
18 defendants they are deadlocked on Counts Three and Four?

19 THE COURT: That's correct.

20 MR. NEIGHER: Just to those defendants?

21 THE COURT: That's correct.

22 MR. BOWMAN: On behalf of defendant Coffey, your Honor,
23 I have to adopt Mr. Sagarin's position. I think it's important
24 for us to know what defendants they are talking about before your
25 Honor gives an Allen charge for the simple reason we don't know

1 if there is a deadlock with respect to certain defendants, but as
2 to his other positions, I adopt his position.

3 MR. CLIFFORD: Your Honor, on behalf of Michael
4 Tiche, I adopt the arguments of Mr. Sagarin. If your Honor
5 decides that he is going to give the modified Allen charge,
6 I think that perhaps we should hear that charge before it's
7 given to the jury. That's an observation. I don't know if
8 that's mandatory or not, but I think it's something that we
9 ought to know about.

10 I do think that Mr. Sagarin is right on the general
11 observations.

12 THE COURT: Does the government have any views?

13 MR. DORSEY: I agree with your Honor's proposal on
14 handling the matter under the circumstances. It might be
15 appropriate to maybe limit the Allen charge language to the
16 further deliberations on the counts on which they have reported
17 themselves deadlocked so there is no --

18 THE COURT: That's certainly what I have in mind.

19 MR. DORSEY: I thought so.

20 THE COURT: The one point that concerns me, I think it
21 was made by Mr. Bowman, is whether the counts should be returned
22 first so that counsel can -- if this was the point -- can really
23 decide what their position is knowing how it affects their
24 client. This way there are some alternative positions that
25 maybe your decision is the same regardless of what the

1 permutations are, and since it's -- we are just before lunch
2 break, I think what I will do is simply take the return of
3 verdicts and then tell the jury, since they have asked would I
4 give them any other instructions, tell them that if there are
5 any other instructions, I will take that up after lunch.

6 MR. SAGARIN: Your Honor, I want to make sure that
7 the record is clear. I object to that procedure of taking the
8 verdicts at this time, that they have reached on some of the
9 counts, without a prior determination as to exactly what's
10 going to happen afterwards.

11 Secondly, I would ask if in the event that we request --
12 that I do request that the jury be polled as to their verdict,
13 that I can -- if that is something that would become necessary,
14 I would like to reserve the right to preserve that until all
15 the verdicts are in on all the counts.

16 THE COURT: All right. Perhaps we ought to find out if
17 that's what all counsel want to do so that issue is not discussed
18 in front of the jury.

19 MR. CRAIG: I have already objected to the piecemeal
20 returning of verdicts on returning of counts.

21 As to polling the jury, I would join in Mr. Sagarin's
22 request.

23 THE COURT: All right.

24 MR. BOWMAN: I join in that.

25 MR. NEIGHER: I join in that.

1 MR. CLIFFORD: I join in that.

2 THE COURT: All right.

3 (Jury entered courtroom at 12:50 p.m.)

4 THE COURT: Good morning, ladies and gentlemen.

5 I have your note which reads as follows: "We have reached a
6 decision on Counts One and Two on several cases, but we are
7 deadlocked on Counts Three and Four with respect to these cases.
8 Would you have any instructions?"

9 Well, first of all, I think it would be entirely
10 appropriate for you to return the verdicts in open court that
11 you have reached. So if the foreman has the verdict form, I
12 think that can be handed up.

13 I think I will defer for at least the moment the issue
14 of any further instruction. It's nearly our lunch break, and
15 I think what I will do is take the return of these verdicts and
16 then let you know after lunch whether I think I will give you any
17 further instructions.

18 All right. Ladies and gentlemen, let me read the
19 verdicts that you have reported. These are relating to
20 Criminal N-75-59.

21 United States against Peter Betres, as to Count One,
22 guilty; as to Count Two, guilty.

23 Are those your verdicts in that case?

24 (Jury answered in the affirmative.)

25 THE COURT: In United States against Ronald D. Betres,

1 as to Count One, guilty; as to Count two, guilty.

2 Are those your verdicts in that case?

3 (Jury answered in the affirmative.)

4 THE COURT: In United States against Albert R.
5 Coffey, as to Count One, guilty; as to Count Two, guilty.

6 Are those your verdicts in that case?

7 (Jury answered in the affirmative.)

8 THE COURT: In United States against Anthony A. Just,
9 as to Count One, guilty; as to Count Two, guilty.

10 Are those your verdicts in that case?

11 (Jury answered in the affirmative.)

12 THE COURT: Just so that the record is clear, you have
13 previously returned verdicts in the Moeller case, the Bubar
14 case, the Dennis Tiche case, and the Connors case, and you have
15 not as yet returned any verdicts in the case of United States
16 against Michael J. Tiche.

17 All right. Then, the jury may resume deliberations
18 and I will advise you after our lunch break whether I intend to
19 give you further instructions.

20 (Jury left courtroom at 12:55 p.m.)

21 THE COURT: Now, I think we ought to first again
22 focus on the issue of any further response to the jury's
23 invitation to further instruction.

24 MR. SAGARIN: Your Honor, I would oppose further
25 instruction and I would move for a mistrial at this point on the

1 latter two counts, the jury having returned a verdict; I think
2 any further instructions particularly coming from the Court would
3 be coercive on those counts. I think that they have
4 deliberated on the individual cases, and they have indicated --
5 and the length of time of deliberation indicates that, I think --
6 and their indication that they are deadlocked, I think, is
7 sufficient basis for a mistrial under the circumstances of this
8 case, particularly considering the length of time since the last
9 piece of evidence came in in the case against -- U.S. against
10 Peter Betres, the length of time since there were summations,
11 and particularly since they have returned verdicts on some of
12 the cases and obviously deliberated on the case against Peter
13 Betres, so I move for a mistrial on Counts Three and Four.

14 MR. CRAIG: I joint in that request.

15 MR. BOWMAN: I join also.

16 MR. NEIGHER: I join also.

17 MR. SAGARIN: I do strongly oppose any attempt to
18 try and get this jury to agree on Counts Three and Four. There
19 seems to be no useful reason for giving that charge in this case.
20 Particularly one of the circumstances we do have to consider, of
21 course, is that there is a state prosecution also pending, so I
22 think that there is no useful reason for holding this jury any
23 longer on those cases.

24 THE COURT: Do you want to be heard as to a mistrial
25 motion?

1 MR. CLIFFORD: Your Honor, I don't know that I can
2 add anything to what Mr. Sagarin said. Obviously, I move for a
3 mistrial on Counts One, Two, Three and Four. We are in the
4 tenth day of deliberation. It seems pretty clear to me the jury
5 has been asking questions over a span of three to four days
6 concerning Michael Tiche. I think any further charge would be
7 coercive, particularly in view of that return of the verdicts
8 here, and I move for a mistrial and that the jury not be given any
9 further instructions.

10 I don't mean to be facetious, but to go further in
11 these deliberations would be both cruel and unusual punishment,
12 for my client, myself and perhaps the jury.

13 THE COURT: There is no doubt that the jury has been
14 deliberating for a somewhat extended period of time. There was
15 reference to ten days. I think on two of those days they
16 promptly went home when a juror was ill.

17 MR. CLIFFORD: I excluded those.

18 THE COURT: There have been ten full days? I don't
19 think so.

20 MR. CLIFFORD: Sixty hours.

21 THE COURT: That may be. That's certainly more than
22 the normal case, but certainly not unprecedented. Some
23 criminal juries have been out a number of weeks and in cases
24 that took less time to present than this one, so I am not going
25 to grant motions for a mistrial, clearly not in the Michael

1 Tiche case where there is no indication at all that the jury
2 has even come to the conclusion in their own minds that they are
3 deadlocked. They simply have not reported, and this jury has
4 demonstrated that it takes up cases one at a time, and they
5 have reported verdicts as to defendants separately, and now
6 have come in with verdicts as to four defendants on two counts,
7 but haven't yet told us anything about where they stand on the
8 Michael Tiche case, so while I understand your view that a lot
9 of time has gone by --

10 MR. CLIFFORD: Not only gone by, but concentrated on
11 Michael Tiche, the Marie Fobes transcript can only be --

12 THE COURT: I don't doubt that somewhere during the
13 time they considered Michael Tiche, but the fact is that they
14 are endeavoring to do exactly what I told them, and in very
15 commendable fashion, and that is to consider these cases
16 separately. Everybody scoffs that a jury can't do that.
17 Everybody makes severance motions because they are certain that
18 jurors will not consider cases separately. This jury has
19 demonstrated that they do consider cases separately, and they
20 have returned verdicts separately, and they have made no indica-
21 tion that they consider themselves deadlocked in the Michael
22 Tiche case, so clearly the motion for mistrial in his case is
23 denied, and they will be permitted to continue deliberations in
24 his case.

25 Now, the cases of the other four defendants are

1 slightly different in that as to two counts, they have said
2 that they are deadlocked, and the issue as to those four
3 cases is whether or not there should be any additional instruction,
4 and I am still of the opinion that there ought to be. It will
5 be, as I have indicated, in a modified form.

6 I will leave it available for counsel. I think they
7 probably heard it in other cases, but I will leave it available.
8 The only wording it doesn't contain is the distinction in its
9 application to cases on which they have indicated a deadlock.

10 As to the Michael Tiche case, I am simply going to
11 tell them that their deliberation should continue as it has.

12 MR. CLIFFORD: I would object to that. I think that
13 you can't separate Tiche from the others, and then indicate that
14 you give a modified Allen charge to the jury, it seems to me
15 that if the basis for not granting the mistrial is they have
16 given you no indication that they are deadlocked on him -- and,
17 by the way, I don't know if they are deadlocked on Three and
18 Four with regard to Michael Tiche, the note is not clear, but --
19 and maybe they are, maybe they are deadlocked on Three and Four
20 -- but it seems to me that in view of your Honor's prior remarks
21 they give you no indication that they are deadlocked or hung up
22 on Michael Tiche, then they should not be given an Allen charge,
23 and I don't think you can separate Michael Tiche from the other
24 defendants.

25 THE COURT: I will endeavor to select words that at

1 least try to do that.

2 MR. CLIFFORD: I object to that, your Honor.

3 MR. CRAIG: Would your Honor leave the Allen charge on
4 the bench for us to read?

5 THE COURT: Yes. Is there anything else to take up
6 at this time?

7 MR. DORSEY: I am only wondering, eventually, we are
8 going to have to face the problem which -- I will have to bring
9 to the Court's attention, with respect to the bond situation,
10 as to the defendants who have now stood convicted of two charges,
11 and that is something that the Court is going to have to resolve.

12 It seems that we might as well meet that right now, so
13 I would simply bring to the Court's attention that change of
14 circumstances and ask the Court to consider whether or not now,
15 as opposed to some other time, i.e., when there is a resolution
16 of the deliberations on the other counts, the Court feels it
17 appropriate to determine what the bond situation should be.

18 The present bond situation, of course is -- was set
19 for a time up through -- presumably up through the time of
20 the rendering of the verdict. We don't have a complete verdict,
21 but we have at least a partial one.

22 THE COURT: Well, I am somewhat reluctant to make any
23 decision on that score while the jury is in deliberation in the
24 case.

25 MR. DORSEY: I don't mean to -- by raising it, to suggest

1 that the Court, of necessity, should do so, but -- and I can
2 share the Court's reluctance, but I felt obliged to bring it
3 to the Court's attention.

4 THE COURT: I think I will just leave matters where they
5 are on that subject for the time being.

6 (Recess taken for lunch.)
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AFTERNOON SESSION

(In the absence of the jury, 2:25 p.m.)

THE COURT: I gather counsel have had a chance to look at the proposed supplemental instruction. They have told me informally that at least one point of objection is the language that talks about future disposition of the counts. Well, the fact is a disposition does have to be made.

I take it the point is that the language, as you read it, made it sound like another jury trial was the only way, or perhaps the most likely way, and I will endeavor to make clear to them that there is nothing inevitable about a jury trial, but it certainly is a possibility.

MR. BOWMAN: If you are going to say that, I think you ought to tell the jury that dismissal is also a possibility.

THE COURT: If I start canvassing all possibilities, that really gets into serious difficulties, because there is at least one possibility I am sure you don't want me to mention. The only -- it gets a little difficult if I start talking about all the things that might happen on either side of the case.

The only thing I am really concerned about is they understand anything that might affect jury consideration, not what the government might do, not what the defendants might do.

MR. SAGARIN: Your Honor, I have a couple of comments I would like to make. First of all, just going back out of the order, what the Court just said, there are really two possible

1 alternatives. One is another jury, and the charge be dismissed.
2 So I don't think there is a multitude of possibilities that
3 the jury has to be concerned about.

4 What bothered me most about the language particularly
5 was the indication, particularly in juxtaposition with the
6 language that there is no reason to believe that another jury
7 can decide it any more conscientiously or better than you.

8 I did call your Honor's attention, through your law
9 clerks, to a couple of cases maybe the Court should consider.
10 One is U.S. against Bass, 490 F. 2nd, 846; B-a-s-s, 490 F.
11 2nd, 846.

12 I think in that case, your Honor, the jury sent the
13 judge a note, and the note said -- there were Counts One through
14 Five, and the note said: guilty, Count One, hung, hung, hung,
15 guilty, Count Five. The judge advised the jury they should
16 continue their deliberation and reach a unanimous verdict, and
17 the Fifth Circuit held that that, as I read it, was an improper
18 Allen charge and reversed.

19 Now, my view of that case is that the Court, having
20 sent the jury back out of the courtroom after they have come in
21 and asked for instructions, the Court has, in effect, given them
22 those instructions, and the only course to remedy that at the
23 moment is a mistrial, the mistrial being granted.

24 Secondly, I call the Court's attention to two other
25 cases: U.S. against Duke, 492 F. 2nd, 693, and U.S. against

1 Amaya, 509 F. 2nd, at page 8, which are both Fifth Circuit
2 cases, one in '74 and one in '75, both of which talk about
3 instructions which tend to tell the jury that they are the jury
4 which must reach the decision, which comes into the problem of
5 the Allen charge to start with. And according to those --
6 what I say in those cases, to the extent that the charge in
7 any way implies that this jury must reach a decision, or should
8 reach a decision, really because they can do it better than
9 anybody else, or at least as well as anybody, it's improper.

10 To the extent the Court is going to give a charge, I
11 would ask that it be added to the charge -- language along the
12 following lines -- perhaps it's not better, but it can be made
13 somewhat better -- but I think the Judge should tell the jury
14 that if they are going to consider the views of the others, they
15 ought to consider the fact that after lengthy deliberations, at
16 least some other jurors have a reasonable doubt, and if the
17 evidence was such as to cause those jurors to hesitate to act in
18 accordance with the reasonable doubt standards, that may well be
19 a basis for the other jurors considering that there is reasonable
20 doubt on those two counts.

21 THE COURT: All right. Any other comments?

22 MR. DORSEY: Your Honor, one technical matter before
23 the jury is brought in. I think your Honor has left open the
24 question, your -- the question of the polling of the jury on the
25 first two counts.

1 THE COURT: No. I thought that was considered, and that
2 all counsel requested that their right to make that request be
3 reserved until the jury is finally discharged in their cases.

4 MR. DORSEY: I wanted to make sure that was clear.
5 There was some suggestions that the interval of seeing what
6 the jury did would afford them an opportunity to see themselves
7 individually what they would do in that regard, and I am assuming
8 that absent an indication to the contrary that they do want to
9 simply hold that open until everything is resolved. But I would
10 suggest that be made clear.

11 The other thing is that ---

12 MR. BOWMAN: I am not clear on what Mr. Dorsey said.

13 THE COURT: The question is: is it still defense
14 counsel's preference that any polling request be deferred until
15 the jury is discharged as to a defendant?

16 MR. DORSEY: I have no objection to that. I want to
17 raise the question, now, if consideration is given to the elements
18 on which the jury has, in effect, convicted for as to the first
19 two counts and what I consider to be the very close interrelation-
20 ship with the third and fourth counts and, indeed, with the --
21 with just some additional elements, the actual transporting in
22 the one instance, the specification of the transporting of the
23 explosives in the third count and destructive device in the fourth
24 count, the thought occurs to me that in order to be clear, that
25 in addition to the modified Allen charge that you have in mind, it

1 would seem to me appropriate, and I would request, that the
2 Court reinstruct the jurors on the elements of the third and
3 fourth counts and on the aiding and abetting charge so that
4 when the matter is resubmitted to them, there will be, in effect,
5 a concentration of the legal elements that are involved in
6 those matters that they still have open for consideration, and
7 I would request that.

8 THE COURT: Gentlemen, at this point I have to tell
9 you what I am going to do. I heard your various suggestions.
10 As I have indicated, I have denied the motion for a mistrial.
11 I think it's entirely appropriate. There is abundant authority
12 to receive counts, receive verdicts on counts and permit a
13 jury to continue deliberating.

14 The further question is: is it at that point
15 appropriate to give a jury any further instruction in the nature
16 of an Allen charge and not give -- in this Circuit, and perhaps
17 elsewhere, as well, that is entirely clear, and I rely on the
18 cases in our Circuit, U.S. against Frankel, 65 F. 2nd, 285, Judge
19 Hand's opinion. The cases Mr. Sagarin relies on are for quite
20 different proposition, not that a charge cannot be given, but
21 that a charge that is given must not be coercive. That clearly
22 is the law, and the phrases that the Fifth Circuit found
23 objectionable are phrases I do not intend to use.

24 I am certainly not going to tell this jury that they
25 have got to return a verdict, and I will put to them the choice

1 they have between returning a verdict or remaining deadlocked.

2 As far as the specifically suggested language, I am
3 going to reject the government's suggestion. The jury has
4 heard the elements several times, and it may be that if they are
5 still in some uncertainty about it, some further explanation
6 must be given, but I think to give them those portions of the
7 charge when not asked for could easily be misinterpreted by
8 them, and I am not going to do that.

9 I am also not going to give them Mr. Sagarin's
10 suggestion, because to be complete, I would have to give them
11 the reciprocal. It may be that there are some jurors who ought
12 to consider that other jurors have a reasonable doubt, but the
13 other side of that coin is that the jurors on the other side may
14 want to consider that some jurors have been already persuaded
15 beyond a reasonable doubt, and I don't think it would be at all
16 appropriate to get into that type of consideration.

17 I think if I give them the language -- it's fairly
18 mild language. It's been often approved, indeed, far more
19 pointed remarks have been approved, but I intend to give it in
20 what I think is a reasonably mild form, but without in any way
21 inviting them to consider particular aspects of what some other
22 juror has considered.

23 I think once I start down that road, there are just
24 enormous difficulties to be encountered.

25 MR. CRAIG: Could I make two very minor supplementary

1 requests, since you're going to recharge? That is, that you
2 repeat your instruction that they can continue to consider the
3 counts individually with respect to individual defendants, and
4 add that to your instruction, and secondly, that you admonish
5 them not to compromise on counts, that each count should be
6 considered independently, and they should arrive at an
7 independent judgment with respect to each count and each
8 defendant. I would make those two minor requests.

9 THE COURT: Well, I will tell them to keep it
10 separate. I think really to tell a jury don't -- not to
11 compromise comes awfully close to insulting them, frankly, to
12 think they are going to trade off among defendants or something
13 like that, or even among counts.

14 I will tell them their affirmative duty, but to start
15 negating things that I have no reason to think this jury --
16 having demonstrated their degree of conscientiousness, I think
17 they would -- at least there is a risk they would misinterpret
18 it as an insult, and I am not going to take that risk.

19 All right.

20 MR. SACARIN: For the record, I join in Mr. Craig's
21 request.

22 MR. NEIGHER: As do I.

23 MR. BOWMAN: Also, I do.

24 MR. CLIFFORD: Also for my client.
25

1 (Jury entered courtroom at 2:40 p.m.)

2 THE COURT: Ladies and gentlemen, the note you sent
3 in just before the luncheon break, in addition to indicating
4 that you had reached decisions, as you reported in open court
5 at that time, your note also inquired as to whether I would
6 have any instructions. As I indicated just before lunch, that
7 I would consider that question and perhaps take it up with you
8 after lunch.

9 Now, there are just a few brief things that I will
10 say. Your note indicates that in four of the cases -- in four
11 of the five cases that you have left for consideration, you
12 are deadlocked as to Counts Three and Four, and the -- what I
13 am going to say at this point obviously relates only to those
14 four cases in which you have reported a deadlock as to Counts
15 Three and Four.

16 As I am sure is clear to you, the case of any defendant
17 is to be considered separately from the cases of other
18 defendants, and consideration of each count is to be done
19 separately from consideration of any other count, and a verdict
20 on any count ought not to influence a verdict on any other
21 count. These are separate matters. I did give you rather
22 extensive instructions early in the case, and some clarification
23 during the case, and I don't want anything I said now to be
24 understood to change in any way anything I have previously said
25 to you.

1 I simply want to bring to your attention some
2 considerations that you may want to bear in mind. If you should
3 fail to agree on a verdict as to some counts in one or more
4 cases, those counts are left open and undecided. They must be
5 disposed of in some way at some time, and another jury trial
6 is always a possibility, though surely not inevitable.

7 If there should be another jury trial, there is no
8 reason to believe that those counts can be tried again by either
9 side better or more exhaustively than they have been tried before
10 you. Any future jury must be selected in the same manner as you
11 have been chosen, so there is no reason to believe that those
12 counts would ever be submitted to twelve men and women more
13 conscientious, more impartial or more competent to decide
14 them, or that more clearer evidence could be produced on behalf
15 of either side.

16 As I have told you, before there can be a verdict
17 on any one count, each of you would have to agree on that
18 verdict. You have the duty to consult with one another and to
19 deliberate with a view to reaching an agreement, if this can be
20 done without violence to individual judgment. Each juror must
21 decide each count in the case for himself or herself, but only
22 after an impartial consideration of the evidence with your
23 fellow jurors. During the course of your deliberations, each
24 of you should not hesitate to re-examine his or her own views and
25 to consider changing his or her own views if convinced that

1 these views are erroneous. However, no juror should surrender his
2 or her honest conviction as to the weight or effect of the evidence
3 solely because of the opinion of his or her fellow jurors, or
4 merely for the purpose of returning a verdict.

5 So if you are able to reach verdicts on Counts Three
6 and Four in the cases you already returned verdicts, you ought
7 to do so. If you cannot, then simply let me know that your
8 deadlock remains and that will end your consideration of those
9 cases.

10 So I simply leave the matter to you on that basis,
11 and the jury may retire and resume their deliberations.

12 (Jury left courtroom at 2:45 p.m.)

13 MR. SAGAREN: I take exception to the Court's charge
14 for the reasons stated before, for the reason I think that an
15 Allen charge at this time is inappropriate, and uncalled for,
16 and because even though the Court attempted by saying there
17 was -- it wasn't a certainty or there was a possibility that it
18 might not be tried again, the Court went on to talk in terms of
19 another jury, where particularly in this case there is a
20 likelihood that the case is -- substantial likelihood whose three
21 counts might not be considered by another jury, particularly in
22 view of the state court charges, and I think the jury should
23 know that, and I ask for a further instruction to advise them
24 of a distinct possibility.

25 I also object to the language that the jury should not

1 hesitate to re-examine his decision, particularly in the
2 absence of an instruction that the juror having -- if he is found
3 that he came to that decision by conscientious deliberation
4 to this date, there is no particular reason to re-examine it.

5 THE COURT: Anything else?

6 MR. BOWMAN: On behalf of Mr. Coffey, I join in that
7 exception.

8 MR. CRAIG: I join on behalf of defendant Just, your
9 Honor.

10 MR. CLIFFORD: For the record, I take the exceptions
11 previously stated to the Court prior to giving that charge.

12 THE COURT: I will not give any supplemental instruc-
13 tion on this topic at this point.

14 All right. Counsel can be in recess.

15 (Recess taken.)

16 (In the absence of the jury, 5:05 p.m.)

17 THE COURT: Gentlemen, it's about five after five.
18 The jury sent a note that they would like to adjourn at 5:00,
19 and one juror has requested that tomorrow they leave at 3:30
20 because of a personal matter that concerns him, so I am inclined
21 to go along with that request.

22 MR. SACARIN: Your Honor, I would like to object to
23 both requests. I think that the Court having charged the jury
24 after -- following their returning verdicts on some of the cases
25 and some of the defendants, that the jury should at least spend

1 a little additional time seeing if they are deadlocked or not
2 on those two counts this evening, and then, I do oppose short
3 deliberations tomorrow for the same reasons. I think that at
4 this point there is significant danger of substantial newscasts
5 coming out, particular about what the different counts carry
6 and what the various sentences may be. I think there is a
7 tremendous risk of exposure and tremendous risk of discussions
8 with persons other than the jury about what they should do on
9 the remaining two counts, and I would oppose their being
10 adjourned at least until much later this evening.

11 MR. NEIGHER: I concur with Mr. Sagarin. I would
12 make one additional comment: that is, I believe your Honor in
13 his supplemental instruction to the jury suggested to the jury
14 that if they should be deadlocked, that they should so inform
15 your Honor, and I believe at this stage, after an additional two
16 or three hours of deliberations, I would think the Court and
17 the defense counsel and defendants are entitled to at least be
18 apprised as to whether or not, per your Honor's instructions,
19 that jury is still deadlocked on, in my case, Count Four, prior to
20 any consideration as to whether or not they go home, I would
21 ask your Honor to make an inquiry of the jury as to whether or
22 not they are deadlocked, per your instruction.

23 MR. BOWMAN: I join Mr. Neigher, your Honor.

24 THE COURT: Well, I am not going to make that inquiry.
25 I think I was pretty clear with them that they should see if they

1 could reach verdicts or if they were deadlocked, they should
2 let me know. They have shown no reticence to let me know when
3 they wish to communicate with me, as they have done about
4 twenty times already, and I will leave it to them to let me
5 know whether they have a verdict as to remaining counts, or
6 whether they are deadlocked.

7 I feel that choice has been clearly put to them. I
8 feel an inquiry at this point might run a serious risk of being
9 misinterpreted by them, so I certainly am not going to do that,
10 nor do I think I should change the adjournment schedule.

11 The concern raised about whether newspaper accounts
12 carry something that would create a problem is -- could be a
13 matter of concern. I will ask the reporters present -- I won't
14 give an order in this regard, but I would ask the reporters
15 present not to report sentence maximums with reference to
16 particular counts at this particular stage of the case. I
17 would seriously request of any reporter if that is to be done,
18 to at least take the matter up with his editor so that a
19 deliberated decision can be made as to whether that needs to
20 appear in tomorrow morning's paper. It seems to me there will
21 be time enough when the jury has completed its deliberation of
22 defendants' cases to advise readers about such details.

23 I think -- I will not, because of that possibility,
24 keep this jury beyond the normal time, because, again, I think
25 that would be coercive and might well be misinterpreted by them.

1 MR. DORSEY: Does that apply, your Honor, to tomorrow
2 and to the weekend? The only reason I am anticipating -- I
3 don't know whether there will be further motions in that regard,
4 but it would seem to me if there is any consideration given to
5 that, it would be fair to the jury to give them some advance
6 warning about it.

7 THE COURT: About what?

8 MR. DORSEY: Whether you're going to keep them
9 tomorrow night at a later schedule, or you're going to adhere
10 to the schedule that you adhered to so far, and that would
11 include letting them go home over the weekend.

12 THE COURT: I certainly plan to let them go home now,
13 and I do plan to honor the request that's been submitted about
14 an adjournment time tomorrow.

15 MR. DORSEY: Which is what?

16 THE COURT: 3:30.

17 MR. DORSEY: I am not making a request. I think if
18 there is going to be anything other than what they have
19 experienced in the past, they ought to be warned about it.

20 MR. NEIGHER: I should point out to the Court that
21 there is represented at least one electronic media here,
22 Channel 8, I am not sure if Channel 3 is here. Does your request
23 apply also to the electronic media for tonight's --

24 THE COURT: Yes. That request is to any reporter
25 covering this trial.

1 MR. SAGARIN: Your Honor, I want for the record to move
2 for a mistrial on Counts Three and Four at this time, particularly
3 in view of the extra length of time the jury has had to consider
4 that, and because of what I consider the coercive instructions
5 which the Court has previously given following the reported
6 deadlock.

7 MR. NEIGHER: I join Mr. Sagarin.

8 MR. BOWMAN: I join Mr. Sagarin on behalf of Mr. Coffey.

9 THE COURT: The mistrial motions are denied.

10 MR. SAGARIN: Your Honor, the reporter for the UPI has
11 advised me that the sentences carried on the two counts, and
12 probably the other counts, is already off the wires.

13 THE COURT: It still is a matter as to what newspapers
14 choose to do with them.

15 MR. SAGARIN: In that regard, I would request that
16 when the jury returns tomorrow that the Court conduct an
17 individual voir dire on the jurors to determine what, if any,
18 news media they have read or heard about in the interim period.

19 THE COURT: Well, I will take that up in the morning.

20 (Jury entered courtroom at 5:10 p.m.)

21 THE COURT: All right, ladies and gentlemen, you have
22 sent a note indicating you prefer to adjourn at five o'clock,
23 and we will do that in just a moment.

24 Again, I caution you about not discussing this case
25 with anybody at home in any fashion, and again I remind you about

1 not looking at any newspaper account and preferably no newspaper
2 at all. I think it's certainly appropriate that you not look
3 at any newspaper account. It must be obvious to you that because
4 you have returned verdicts, there will probably be a newspaper
5 article reporting the action you took, so I think the safest
6 thing is not to look at newspapers at all, lest even
7 inadvertently you should see those articles. And, of course,
8 that applies to any radio or television accounts. Just insulate
9 yourselves from all such matters until your deliberations are
10 concluded.

11 Now one juror has asked that in the event
12 deliberations are not concluded tomorrow, that your adjournment
13 time be 3:30, and because it relates to a personal matter -- and
14 I am inclined to go along with that request.

15 In any event, the jury is excused until ten o'clock
16 tomorrow morning. Please again wait until all twelve are
17 assembled before actually beginning your deliberations.

18 All right, jury is excused.

19 (Jury excused. Court adjourned at 5:15 p.m.)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

-----X
: UNITED STATES OF AMERICA,
:

vs. :

CHARLES D. MOELLER, et al., :

Defendants. :
-----X

Criminal N-75-59

New Haven, Connecticut
January 30, 1976

B e f o r e:

Hon. JON O. NEWMAN, U.S.D. J.

SANDERS, GALE & RUSSELL
CERTIFIED STENOGRAPHIC REPORTERS

750 MAIN STREET
HARTFORD, CONNECTICUT

141 CHURCH STREET
NEW HAVEN, CONNECTICUT

1 (In the absence of the jury, 10:30 a.m.)

2 THE COURT: Now, last evening there was a request that
3 the jury this morning be inquired of as to whether they had seen
4 any articles. Is that request still pending?

5 MR. SAGARIN: Yes.

6 THE COURT: I will make the -- I think the request
7 was that they be polled individually. I don't proposed to do
8 that unless there is a response that needs to be developed.

9 MR. SAGARIN: Would you like some of the newspaper
10 clippings as part of the record? I would like to offer the
11 Daily News coverage. There is a quote of some of the defendants.
12 The Hartford Courant refers to sentencing under the first two
13 counts.

14 THE COURT: Is there any article that refers to
15 sentencing other than the Courant article that you know of?

16 MR. SAGARIN: Not to my knowledge, your Honor, and I
17 didn't hear the news broadcasts on Channel 8. I know there was
18 coverage on Channel 8, but I didn't hear whether or not there
19 was any sentencing reference.

20 THE COURT: Channel 3 did not, and I heard a radio
21 account that made no mention of it. These can be marked
22 as a group as a Court exhibit.

23 MR. CRAIG: I request that you do have an inquiry
24 of the jury and they be advised under oath with respect to
25 their answers, or that their oath be administered again.

1 THE COURT: I think that really comes close to telling
2 a juror that I suspect they are dishonest, and I don't propose
3 to say that to a jury, and I don't propose to say anything that
4 runs the risk of that kind of interpretation at this time.
5 They have taken a voir dire oath, and I don't propose to give
6 it to them again, nor treat them as somebody who is being
7 cross examined.

8 MR. NEIGHER: If your Honor please, I am apprised that
9 the New York Daily News article refers to the potential
10 liability of the individuals, criminal defendants in this case.
11 I believe there was a UPI wire story that went out --

12 THE COURT: That refers to the exposure of those on
13 the counts on which there was a conviction, not as to the counts
14 on which decisions have not been reached.

15 MR. NEIGHER: That's correct.

16 THE COURT: That brings nothing to the attention of
17 the jury that they don't have. Counsel brought out that John
18 Shaw faced that exposure on two counts that he pled. There are
19 no new facts introduced by that.

20 MR. NEIGHER: I wish to renew the request that the
21 jurors be polled individually for the following reasons: and that
22 is that it's quite easy for the jurors to remain silent in face
23 of a general inquiry of the Court, and especially after
24 deliberating for 15 days, or calendarwise, 15 days, I believe that
25 at this stage, it would be appropriate to question them

1 individually, it would take nothing more than a moment. I don't
2 think it's questioning their individual veracity or insulting the
3 jury in any way to request them individually to answer just
4 yes or no, have you seen anything in the papers referring to
5 what your Honor referred to yesterday, and the answer is either
6 yes or no.

7 THE COURT: Well, I am not going to do it. If there
8 was something that was just of dire significance, an excluded
9 confession or something of that sort, that might be appropriate,
10 but the whole issue is hardly worth this concern, frankly.
11 Penalties are not for their concern. There is in evidence some
12 basis on which they might reach a conclusion as to the relevant
13 penalties, anyway, that was brought out from John Shaw as to
14 what he pled to and what he faces, so we are talking about
15 something that is already inferable from the record, and not
16 particularly serious, even if it weren't, and they found out,
17 so I will make a general inquiry, if somebody did read something,
18 I will pursue that with that person individually, but -- and
19 the circumstances; I think, even that is more than needs to be
20 done.

21 Now, they have sent a note this morning which reads
22 as follows: "During one of your explanations on Count Four,
23 you mentioned 'help retain or possess the firearm.' Could you
24 review that portion of your explanation?"

25 They are concerned with a phrase that they have

1 quoted which reads, "help retain or possess the firearm." This
2 is in reference to Count Four.

3 Well, I am really not sure how much clarification can be
4 made on that, but I will endeavor to say something about it.

5 MR. CRAIG: Your Honor, on behalf of defendant Just, I
6 would request that nothing be said on that, and they have been
7 instructed at least five or six times on precisely that point.
8 I have objected on each occasion, and I renew my objection for
9 the same reasons as stated before.

10 MR. SAGARIN: Your Honor, I don't know what the Court
11 is intending to do. If the Court were going to do anything,
12 I think that all it ought to do is to reread its charge on
13 Count Four, but to start picking pieces of it, I think at this
14 stage, can only be confusing.

15 MR. NEIGHER: If your Honor please, I believe on January
16 27 in response --

17 MR. CRAIG: I can't hear you. Speak up.

18 MR. NEIGHER: On January 27, your Honor, in response to
19 a question from the jury specifically, "If we find the defendant
20 abducted the guards in Plant Four, must we find that that
21 defendant aided and abetted the possession of a firearm?", and
22 I believe your response was generally, no, and you briefly explained
23 that it's up to the jury to determine whether: one, defendant
24 did certain things alleged in the count and; two, whether that
25 action aided and abetted the possession, so if your Honor is

1 going to endeavor to further instruct the jury at all, which I
2 would object to and join Mr. Craig -- but if your Honor is, I
3 would merely ask that it be framed that it's up to the jury as a
4 fact question to determine whether the action of any defendant
5 aided and abetted the possession and nothing further. This is,
6 as Mr. Craig noted, the fifth or sixth time that the jury has
7 been instructed on that point.

8 MR. BOWMAN: My position is a little different from Mr.
9 Neigher's. I am not sure they are talking about aiding and
10 abetting at all, so unless they are talking about aiding and
11 abetting, I oppose any rereading of the Court's instructions on
12 aiding and abetting.

13 To be candid with the Court, I don't recall exactly
14 where in the Court's charge the words "help retain" appear, but
15 I would object to any rereading of the aiding and abetting
16 charge.

17 MR. CLIFFORD: On behalf of Michael Tiche, I would
18 object to any further reading to the jury on your instructions
19 on Count Four. They have had that now any number of times.
20 I would object.

21 MR. DORSEY: The only observation that I would make,
22 if your Honor please, is that the question of possession, if I
23 recall correctly, in the charge, really, although, of course, it
24 involves aiding and abetting, also, but is couched the way you
25 expressed it to them more in terms of actual possession as

1 opposed to the concept of the power, the right, the ability to
2 exercise, in effect, dominion and control. That's not really a
3 constructive possession charge, but it has some of the flavor
4 of that, and in view of the circumstances here, including
5 specifically the type of destructive device involved, it would
6 seem to me there might be some clarification. I am frank to
7 say, since I didn't anticipate the problem, I have not -- have
8 any suggestions in the way of specific language to offer, but
9 something that would clarify the ability under the law to
10 possess by the mere exercise of authority or dominion over it
11 might be helpful in the problem that I think this jury is
12 wrestling with, because you cannot have actual physical possession
13 in the small items possession concept, and I would make the
14 request that the Court give consideration to that sort of
15 additional language.

16 THE COURT: I will endeavor to respond to their inquiry.
17 I just don't think it's appropriate to reject their effort to
18 obtain some clarification. The concepts of possession and aiding
19 and abetting may be familiar to lawyers, but they are certainly
20 not familiar to jurors. When they refer to the concept of helping
21 to retain or possess a firearm, it seems to me obviously they are
22 concerned about what I meant by how you could aid or abet someone
23 else's possession.

24 I am not going to read the whole charge that deals with
25 any other things, the knowledge and what is a device and things

1 that obviously are not what they are asking about. I will
2 endeavor to do it briefly, but I will say something to them.

3 Now, one other point on the newspaper situation. It
4 was brought to my attention this morning that there was in the
5 jury room a copy of yesterday morning's New Haven Journal
6 Courier, the edition of Thursday, January 29. That was before
7 the verdicts of yesterday, so obviously it makes no mention of
8 those. It would appear that it may have been left there by
9 a janitor or something of that sort. I will inquire about it.
10 The article can be marked. I think it's an entirely innocuous
11 article which, even if read, would cause no problem at all, because
12 the headline is that the Shelton trial was delayed, and it
13 reports that the jury went home because one juror was ill, but
14 I will inquire about it nonetheless.

15 MR. CRAIG: With respect to the instruction on the
16 retaining, do you intend to read, also, the government's
17 contentions with respect to the abduction?

18 THE COURT: No.

19 MR. CLIFFORD: I take it that we will be given an
20 opportunity to be heard outside the presence of the jury after
21 your voir dire, whatever answers come out. I don't have any
22 anticipatory type of motion until I hear what the jury has to say.

23 THE COURT: Well, let's see whether there is any
24 response that requires any further consideration.
25

1 (Jury entered courtroom at 10:45 a.m.)

2 THE COURT: Good morning, ladies and gentlemen. Before
3 I turn to the question that you have submitted this morning, I
4 want to take up on other thing. It came to my attention that
5 a newspaper was found in the jury room this morning. It's the
6 Journal Courier, the New Haven Journal Courier, from yesterday
7 morning. It's not today's paper. It's yesterday's paper.

8 So the first thing I want to know -- and in asking
9 this of you as a group, if there is any detail to the answer, I
10 would rather hear that individually, so I just want to know now --
11 let me put it this way: Are there any jurors who were aware that
12 this edition of yesterday's Journal Courier was in the jury room
13 when they came in this morning? Was it any member of the jury
14 who gave this to somebody? Some security personnel brought it
15 to my attention, so I am not quite clear what the situation was.

16 THE FOREMAN: I discovered that on the office -- on a
17 desk, and I immediately asked if anybody brought it in or knew
18 anything about it, and I got negative answers in both respects.
19 Then I brought it to the marshal, and I said we discovered it in
20 this manner, and we don't know who brought it in. We don't know
21 how it even got there, so --

22 THE COURT: All right. Then I will ask just a further
23 question. Did any member of the jury have occasion to look through
24 edition? Either in the jury room or outside the jury room?

25 All right. Then, let me also ask whether since we

1 adjourned last night, whether there has come to the attention
2 of any juror a newspaper article or radio or TV account of the
3 trial in any way? I appreciate I instructed you not to look at
4 those papers or hear accounts, but it could happen that just
5 despite your best efforts not to, that it just happens, sometimes
6 it does. Sometimes it just -- something is left inadvertently where
7 you might see it or somebody says, "Gee, did you see this," and
8 something like that, and despite your best intention, these things
9 happen, so I just want to inquire whether that has happened in
10 this case?

11 All right. I take it from your negative response it
12 has not, so I will then turn to your inquiry of this morning.

13 Your note says, "During one of your explanations on
14 Count Four, you mentioned 'help retain or possess the firearm.'
15 Could you review that portion of your explanation?"

16 Well, I am really not sure whether I can be very helpful
17 on this point. I am not going to reread everything I told you
18 about Count Four. It seems to me the phrase you focused on
19 by referring to the word "help" in connection with possession
20 the firearm raises an inquiry about the concept of aiding and
21 abetting someone else's possession.

22 Now, as I mentioned, possession is one of the elements
23 of that particular offense, not the only element, but it's one
24 of them. And I went over with you on more than one occasion the
25 concept of aiding and abetting, and I can appreciate that those

1 are not words you ordinarily use. They are lawyer talk. They
2 are not layman talk. Let me just read one paragraph that tries
3 to get at the -- something at the core of aiding and abetting.

4 In order to aid or abet another to commit a crime,
5 it is necessary that the accused willfully associate himself in
6 some way with the criminal venture and willfully participate in
7 it as he would in something he wishes to bring about: that is
8 to say, that he willfully seek by some act of his to make the
9 criminal venture succeed.

10 Now, Count Four charges possession of the unregistered
11 firearm. So whether a person has, as you put it, helped to
12 possess within the meaning of the aiding and abetting statute
13 means whether or not he has taken some action that indicates he
14 is trying to assist a person who actually did possess the firearm.
15 Did he join with that person in some way to carry forward, to
16 assist, to help bring about that person's criminal activity, or,
17 in terms of Count Four, that person's possession of an
18 unregistered firearm. It doesn't mean did he physically lay a
19 hand on the firearm? At least, it's not limited to that.

20 You can participate in various ways, and you heard the
21 evidence, and it's up to you to decide whether the actions of
22 a defendant whose case you're considering did indicate his
23 participation in the criminal venture charged in Count Four, or
24 in terms of the words I read you, did he willfully seek by some
25 act of his to make that criminal venture succeed?

1 If he was a bystander, if he simply knew it was
2 happening, but didn't join it, didn't participate, he didn't aid
3 and abet; but if he took some action to help make that venture
4 succeed, then he could be found to have aided and abetted, or,
5 as you put it, to help possess that firearm.

6 Now, whether you make that finding or not is up to
7 you. I have tried to indicate the standard. I can appreciate
8 that there is some lack of precision to these words, and
9 ultimately the decision is up to you whether you find, and,
10 of course, before you can return a verdict of guilty, you
11 have to find beyond a reasonable doubt as to this aspect, like
12 any other element of the crime, that a person did willfully
13 associate himself in some way with the criminal venture of
14 possession an unregistered firearm, willfully participate in it
15 or seek by some act of his to make the criminal venture succeed.
16 It's in that sense that a person can be said to aid and abet
17 someone else to commit a crime, or in this case, as the charge
18 is, to possess an unregistered firearm.

19 So if you have a reasonable doubt as to whether a
20 defendant did that, then you must find that defendant not guilty.
21 If you think a defendant took that sort of action, demonstrated
22 that sort of participation, and if you find other elements are
23 established, then you're entitled to return a verdict of guilty
24 of that defendant on that count.

25 Jury may retire.

1 (Jury left courtroom at 10:57 a.m.)

2 MR. SAGARIN: Your Honor, I would like to except to
3 the Court's charge. I think the Court's charge, which was sort
4 of an off the cuff advice to the jury, which the Court attempted
5 to respond to their charge, short cut all of the things which a
6 jury must find before they could find a defendant guilty. I
7 think it misstated and -- he made -- misstated what aiding and
8 abetting, Count Four was all about. I think it was wrong. The
9 Court -- we are talking about possession of an unregistered
10 firearm, and aiding and abetting must be -- the crux of that
11 charge is the nonregistration. It's not the possession of a
12 firearm. It's the nonregistration of aiding and abetting.--
13 I think it has to be with respect to the nonregistration.

14 The Court's first charge had some of that flavor, but
15 this charge took that all out and seemed to indicate to the jury
16 if they found the defendants were -- willfully participated in any
17 way in the venture and hoped that the venture succeeded, and
18 when the Court referred to venture, it wasn't clear at all that
19 the Court was talking about the nonregistration venture. Then
20 they could find the defendant guilty.

21 In view of the verdicts that have already come in,
22 I think the Court's charge was entirely prejudicial, particularly
23 coming after the Court's given an Allen charge. I except to it.
24 I ask -- the only curative thing would be to tell the jury to
25 disregard what it just told them and reread them the charge on

1 Count Four entirely. I think the Court is -- entirely confused
2 them and allowed them to find a defendant guilty simply by being
3 part of -- by having them found guilty of Count Two.

4 MR. NEIGHER: I join with Mr. Sagarin and would
5 except to your Honor's emphasis on aspect of venture. I think
6 the jury is somewhat confused as to which venture we are talking
7 about in this case, and I think the emphasis on venture, in
8 generally, rather than the actual act of possession or aiding and
9 abetting of possession and -- is prejudicial, and I think the
10 entire charge should be read back.

11 MR. CLIFFORD: For the record, on behalf of Michael
12 Tiche, I join in Mr. Sagarin's objection.

13 MR. BOWMAN: I also join Mr. Sagarin, except that my
14 objection really doesn't pertain as much to the nonregistration
15 as it does to what I think the jury was focusing on a very
16 specific inquiry to help retain the firearm, and the Court
17 gave the most generally possible language concerning the
18 definition of aiding and abetting, and I object to it, and I
19 except to it, and I don't believe there is any curative
20 instruction.

21 MR. CRAIG: Your Honor, I join with Mr. Bowman and Mr.
22 Sagarin's position, and except to the Judge's instruction.

23 THE COURT: All right. I will not instruct further in
24 light of counsel's request. If the jury has some further inquiry,
25 that's another matter. I can appreciate that counsel want to

1 express their dissatisfaction with each thing that's said, but
2 I am entirely satisfied that I did not distract their attention.
3 I reminded them specifically there are other elements of the
4 offense, I referred specifically to possession of an unregistered
5 firearm. It's not surprising I didn't dwell on registration, since
6 nobody argued that point to the jury at all.

7
8 Their question talks about what it means to help
9 possess a firearm. That's what they asked, and that's what I
10 endeavored to tell them.

11 If what I told them is not the correct law, that's
12 something else again, but I don't believe that I told them
13 anything that is not an accurate statement as to what it means to
14 aid and abet someone to do the act of possession, and that's the
15 topic they focused on, and while I did feel I should remind them
16 there are other elements, I just can't at each inquiry tell
17 them everything else in the charge. I have to try to take them
18 seriously and answer their question. What's what I tried to do,
19 and if it turns out to be erroneous, I will be so advised.

20 All right.

21 (Recess taken.)

22 (In the absence of the jury, 3:40 p.m.)

23 THE COURT: There is a note from the jury that indicates
24 they request adjournment at 3:30, as stated yesterday. I had
25 hoped all counsel would be here at this juncture, but apparently
Mr. Craig is on trial upstairs in Judge Zampano's courtroom and

1 is now in the middle of surmations.

2 That being so, I am reluctant to take any action other
3 than recessing the jury in his absence, but I can appreciate
4 that perhaps you have claims you want to make, and so you can be
5 heard, although I request you be heard briefly because, as you
6 know, it is important to one juror to keep a doctor's appointment
7 this afternoon.

8 MR. SAGARIN: I don't mind being heard after the jury
9 is excused. We made our points to the Court.

10 THE COURT: Bring them down.

11 (Jury entered courtroom at 3:45 p.m.)

12 THE COURT: Ladies and gentlemen, you sent a note
13 indicating that you request to adjourn at 3:30, as stated yester-
14 day, and I did indicate that I would endeavor to comply with
15 that request, and I am sorry I am a couple minutes late, but
16 we will let you go now.

17 Please again scrupulously observe the cautions I
18 have given you, particularly over a weekend recess more than
19 just an overnight recess, about not discussing the case with
20 anyone, even at home, and avoid any newspapers and any radio or
21 television accounts of the case. Just bear in mind faithfully
22 the instructions I have given you during all this period of
23 deliberations.

24 The jury will return ten o'clock Monday morning and,
25 as usual, wait until all twelve are in attendance before actually

1 beginning to resume your deliberations.

2 All right.

3 (Jury excused.)

4 MR. SAGARIN: Your Honor, when prior to the jury
5 coming in we had advised the Court at the bench that we thought
6 this jury should be inquired of as to whether they were still
7 deadlocked in view of their notes yesterday, and moreover,
8 regardless of that, we had advised the Court we intended to
9 move for a mistrial on account of the length of deliberations
10 and in view of the note, and in view of the length of proceedings
11 since the Allen charge, so at least on behalf of the defendant
12 Peter Betres, and since Mr. Craig is not in the courtroom,
13 I believe he also, at least for the mistrial motion, would join
14 in that. I join in it on his behalf, although I will let him
15 make his own record.

16 I move for a mistrial at this time, and if the Court
17 is not -- feel an inquiry should be made, at least if the jury
18 returns, to make an inquiry upon the return, and if it's
19 indicated that there is a deadlock, we would ask for a mistrial.

20 We feel that the length of deliberations at this
21 time now going into the month of February are long enough. If
22 they can't reach a decision, they have had all the law and
23 all the facts for almost seventy hours, and we would ask the
24 Court declare a mistrial on Counts Three and Four.

25 MR. NEIGHER: I join in Mr. Sagarin's request.

1 MR. BOWMAN: I join in Mr. Sagarin -- and also I really
2 couldn't hear whether or not he moved, in addition to the grounds
3 he moved on -- whether or not he stated that he objected to an
4 inquiry not being made now, that whether or not they were
5 deadlocked.

6 On behalf of the defendant Coffey, it was my feeling
7 that an inquiry should have been made today, so I object or
8 except to that procedure, also, in addition to my motion for
9 mistrial.

10 MR. CLIFFORD: Your Honor, on behalf of the defendant
11 Michael Tiche, I likewise move for a mistrial, and amplify only
12 indicating my motion is directed to Counts One, Two, Three
13 and Four.

14 THE COURT: Well, the motions for mistrial are denied.

15 The question of whether any inquiry should be made to
16 the jury as to whether further deliberations might be useful
17 on Counts Three and Four in the four cases on which they have
18 returned verdicts, but are still deliberating those two counts,
19 I will take that matter up with counsel Monday morning. I would
20 have taken it up now had Mr. Craig's other trial schedule
21 permitted his appearance now, but I don't think that's the type
22 of matter that can be resolved in the absence of any counsel.
23 And also, while I can see some counsel might have preferred it
24 happen at the end of today, I don't think there is really much
25 significance between considering that matter at the end of one

1 days' deliberation or at the beginning of another day's. So I
2 will take that up with counsel.

3 I will ask you to be in attendance a few minutes
4 ahead of ten on Monday so we can consider that and see what
5 counsel want to do, and then a decision will be made as to
6 whether an inquiry should be made Monday morning.

7 MR. DORSEY: Would the record show that while Mr.
8 Craig was not here, Mr. Just was here for the dismissal of the
9 jury? I don't know that it's crucial, but the record should
10 show it.

11 THE COURT: All right. We will take a recess.

12 (Court adjourned.)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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:
UNITED STATES OF AMERICA,
:
vs.
:
CHARLES D. MOELLER, et al., Criminal N-75-59
:
Defendants.
:
-----X

New Haven, Connecticut
February 3, 1976

B e f o r e:

Hon. JON O. NEWMAN, U.S.D.J.

1 (In the absence of the jury, 10:30 a.m.)

2 THE COURT: All right, gentlemen, when we recessed
3 on Friday, several counsel indicated they wished to take up
4 the matter of whether any inquiry should be made to the jury,
5 presumably with respect to the two counts in the four cases on
6 which they reported disagreement on Thursday, and at the end
7 of Friday, since Mr. Craig was then before Judge Zampano, and
8 I told the jury they could recess at an early hour, I indicated
9 we'd take the matter up Monday morning. Then Sunday, yesterday,
10 turned out to be a blizzard, and so the matter is before us
11 this morning.

12 So, I'll hear what your requests are.

13 MR. BOWMAN: Your Honor, on behalf of defendant
14 Coffey, I would move that inquiry be made of the jury as to
15 whether or not they are deadlocked at this point with respect to
16 Counts Three and Four of the indictment.

17 As your Honor will recall, verdicts were read in the
18 first two counts, an Allen charge was given, and then a
19 supplemental request for additional instruction with respect to
20 Count Four was requested by the jury. After that, the Court's
21 instruction, the jury went on to deliberate, they went home at
22 3:30 on Friday, because Mr. Pond apparently had a doctor's
23 appointment.

24 I think it's important that we know at this point
25 whether or not they are deadlocked, and I move that such an

1 inquiry be made of the jury at this time.

2 MR. SAGARIN: Your Honor, the first thing I'd ask
3 before the jury's instructed, I'd move for a mistrial at this
4 time. I think the lengthy deliberations, it's now six weeks,
5 and any testimony in the case of Peter Betres -- it's a little
6 hard to believe the jury can still remember the facts as they
7 were presented. It's been a -- four weeks since argument. I think
8 the jury deliberations have extended over too long a period of
9 time for there to be any more meaningful consideration.

10 Secondly, I feel it is important to have an individual
11 voir dire, at least to report on Mr. Pond's condition of health,
12 which has caused them during the course of deliberation,
13 including prior to the agreement on the two counts, in which
14 there was agreed to miss at least two days of deliberation
15 and then to have to adjourn early because of an ulcer condition,
16 and I think it's important to know whether he is physically able
17 to continue the deliberations in the manner that a juror should,
18 particularly after the Court has given an Allen charge which,
19 to some degree, is coercive, and gave a supplemental charge, which
20 we felt was very coercive, so I would ask, in addition to the
21 group voir dire of the jury, that if the motion for mistrial is
22 denied, that Mr. Pond be individually voir dired about his
23 health condition.

24 THE COURT: You say if -- you said if there's an
25 inquiry. That's what I want to know is whether you want an

1 inquiry.

2 MR. SAGARIN: I want an inquiry if the motion for
3 mistrial is denied.

4 THE COURT: You want the same inquiry Mr. Bowman wants?

5 MR. SAGARIN: If the motion for mistrial is denied.

6 THE COURT: All right. Well, do other counsel want
7 to be heard?

8 MR. NEIGHER: I join with Mr. Sagarin, your Honor.

9 MR. CLIFFORD: I would join Mr. Sagarin, also, your
10 Honor, specifically on the issue if Mr. Pond's present.

11 THE COURT: What about specifically on Mr. Bowman's
12 request?

13 MR. CLIFFORD: Well, your Honor -- apparently is
14 addressed to the lawyers who -- whom the jury have indicated
15 that they're hung up on Counts Three and Four.

16 THE COURT: I want to know the views of all attorneys
17 for the defendants before I make a decision on this matter.

18 MR. CLIFFORD: I would request that the jury be inquired
19 as to whether they are hung up on their deliberation, and I would
20 request that it include all verdicts, not only those that I have
21 previously indicated.

22 MR. BOWMAN: Your Honor, I just want to make my
23 position clear with respect to the individual voir dire of Mr.
24 Pond, and that is I object to any individual voir dire of Mr.
25 Pond until an inquiry is made to the jury as a whole as to whether

1 or not they're deadlocked on Counts Three and Four.

2 THE COURT: All right.

3 MR. CURTIS: I join in Mr. Bowman's position and
4 Mr. Sagarin's should a mistrial not be granted.

5 THE COURT: All right. The motion for mistrial is
6 denied. The deliberations have extended over a period of time,
7 although not an extraordinary number of actual deliberation
8 days has been involved. And I just see no basis whatever for --
9 at this stage -- terminating their deliberations simply by the
10 passage of time. They have a number of cases, they have been
11 handling them individually, reporting verdicts as they reach
12 them, asking for supplemental instruction along the way, and
13 I just see no basis whatever to terminate their deliberations.

14 As far as the request to make an inquiry of one of
15 the jurors as to health, I don't think that's an appropriate thing
16 to do. The jury is currently deliberating, and I think inquiries,
17 while that process is going on, ought not to be done unless
18 plainly warranted.

19 It is a fact that, as the juror's note indicates, which
20 is a matter of record, that on a prior occasion he asked to go
21 home early saying he didn't feel well. On Thursday of last week,
22 he asked to adjourn at an early hour, not because of any
23 complaint about his health, but simply because he wished to
24 see a doctor, and I thought that was certainly a reasonable
25 request.

1 Now, if he reports a health condition that raises a
2 ground for further inquiry as to appropriateness of his continu-
3 ing, that's something else again. But just because the man
4 requests to leave a little early so he can make a doctor's
5 appointment, I don't think is a sufficient reason to interrogate
6 him on that subject.

7 I understand it, then, that no defense counsel
8 objects to the jury being asked, at least as to Counts Three
9 and Four of the four cases on which they reported disagreement,
10 as to whether their deadlock remains, or as I would probably put
11 it to them, or whether they think that further deliberation
12 would be useful.

13 I understand Mr. Clifford prefers that inquiry to
14 include all counts of his client, but in the absence of any
15 report from the jury that they have any disagreement as to his
16 case, I don't think there's any basis for my making such an inquiry
17 of them. But I will make the inquiry as to the two counts of
18 the four cases on which a disagreement was reported. They made
19 that report to me, I think it was in the middle of Thursday.
20 They were given a supplemental instruction after lunch on
21 Thursday, and a further instruction on Monday -- on Friday, excuse
22 me. And I think it's appropriate to note, particularly since
23 they have another case before them, as to which they've made no
24 report at all, and if, in fact, they are deadlocked on those two
25 counts, it would be well to know it so that their attention can

1 be focused solely on the matter as to which they've made no
2 report at all.

3 MR. DORSEY: With respect to your Honor's last observa-
4 tion, I'd point out -- and I would feel that the Court should not
5 make an inquiry as to the third and fourth counts at this time,
6 because when your Honor instructed them, and your use of the
7 modified Allen charge, you told them specifically to try to see
8 if they could resolve the question, but that if they did not find
9 themselves able to resolve it, and that they should not feel
10 individually obliged to resolve it, that that would be the end of
11 it.

12 Now, they have not reported that they are at the end
13 of their ability to deliberate further with prospective, fruitful
14 conclusions to those deliberations, and having in mind that the
15 Court cannot send them back again, it would seem to me that the
16 more appropriate thing would be to leave to them to report if
17 they are, in fact, deadlocked on those counts.

18 THE COURT: Well, if those were the only counts before
19 them, I might do it that way, but I am bit concerned that with
20 another case, as to which they've made no report, still before
21 them that their attention should again be focused on the choice
22 of either deliberating further on the two counts in the four
23 cases, or reporting a deadlock. So that if they wish to report
24 a deadlock, we know that, and it may be they wish not to. But
25 I think it is appropriate that at this juncture we find out. The

1 choice remains theirs.

2 MR. DORSEY: Since the Court has already, in effect,
3 told them that, and since they have not appeared bashful about
4 letting the Court know -- reporting on the status of their
5 deliberations on any matters, including the deadlock, it would
6 not seem to me appropriate to make specific inquiry of them, but
7 rather leave to them, at least at this juncture, the question of
8 whether they wish further deliberations.

9 MR. SAGARIN: Your Honor, in denying the motion for the
10 individual voir dire, Mr. Pond, the Court generally referred to
11 a health problem, I think the record should reflect that of
12 which we're aware, and I believe is reflected in the notes to the
13 juror, or at least in comments to the Court from the marshal
14 as to requests that the nature of the illness was -- which also
15 caused Mr. Pond to miss a couple of days of trial, was an
16 ulcer condition, and one which I think we can take some notice
17 of is an ulcer condition is one generally aggravated by stress,
18 so it's not as if he was going to a doctor, a podiatrist or
19 because he had some allergy, I think it's an illness which is
20 sufficiently related to stress that inquiry ought to be made, and
21 I think the record should reflect that unless facts which the
22 Court is aware --

23 THE COURT: The only facts I know of are those
24 reflected in his notes, which are a matter of record.

25 MR. SAGARIN: Your Honor, I haven't seen the notes.

1 THE COURT: They have all been filed each time they
2 have been sent.

3 MR. SAGARIN: I don't think we're mistaken on that,
4 but if there was, I thought there'd be an opportunity to correct
5 the record if we were mistaken on the nature of the illness.

6 THE COURT: No, I don't think you are.

7 MR. DORSEY: As to your intention that you were going
8 to make inquiries as to the third and fourth counts, is it your
9 intention to ask them if they're deadlocked, or ask them if
10 they feel after this moment further deliberations as to those
11 counts appear fruitful -- at least possibly going to produce
12 some resolution?

13 THE COURT: I intend to ask them which of those two
14 situations presently obtains. I'm not going to direct my
15 inquiry to one or the other.

16 MR. DORSEY: Well, may I point out, your Honor, this
17 is a little cumbersome as to how to handle it, in a way, because
18 you've got four defendants and a total of actually seven counts
19 which they are still considering in that category. Furthermore,
20 they are deadlocked, at least as of this moment, if the situation
21 that existed as of the time that they reported themselves
22 deadlocked on Thursday still prevails, which we assume to be
23 the case since they haven't reported any agreement.

24 THE COURT: Well, I don't know that, you see.

25 MR. DORSEY: Well -- but, I can't -- I don't think the

1 Court can presume that they go from a Thursday deadlock to all
2 of a sudden be undeadlocked. In other words, what I'm saying
3 is that it isn't really --

4 THE COURT: For all I know, right now they can be in
5 the middle of a very animated discussion, whatever their ballot
6 was, they could have changed. There's no reason to think that
7 the precise situation they reported on Thursday hasn't changed
8 today. The fact that they haven't returned a verdict doesn't
9 mean that there's been no further consideration.

10 MR. DORSEY: What I'm saying is that the two
11 alternatives that you intend to give them aren't necessarily
12 mutually exclusive. They may still be deadlocked, but on the
13 other than, they may also be, because the deadlock still exists --

14 THE COURT: I will endeavor to explain to them that
15 deadlock is the opposite of the situation in which further
16 deliberations might be useful.

17 MR. CRAIG: Just a brief question, your Honor. Do
18 you intend to ask them for answers from the jury box and
19 individually poll them as to the response to your inquiry? In
20 other words, what is the means by which you intend to get the
21 response from the jury to your question?

22 THE COURT: I'm going to ask the foreman and leave it
23 to him to decide whether he is in a position to respond now or
24 would like to consult with the jury as a group before he
25 responds.

1 MR. CRAIG: I'd request for an individual poll of the
2 jury in the box, your Honor, for the response to your question.

3 THE COURT: No, I'm not going to do that.

4 (Jury entered courtroom at 10:50 a.m.)

5 THE COURT: All right, ladies and gentlemen. As you
6 recall, on Thursday you sent me a note indicating that as
7 to the remaining counts in four of the cases, those of Peter
8 Betres, Anthony Just, Albert Coffey and Ronald Betres, you
9 reported that there was a deadlock on the remaining counts with
10 which those defendants are charged, and I think it was after
11 lunch on Thursday I gave you some additional instructions which
12 indicated that if further deliberations would be useful, that
13 would be entirely appropriate, and that if your conclusion was
14 that the deadlock remained, that that would be entirely appropriate
15 and -- and that you should let me know if that was the situation.
16 And, of course, you also have pending before you all four of
17 the counts in the case of Michael Tiche, as to which no report
18 has been made at all.

19 Now, with respect to the four cases as to which you did
20 report a deadlock, the cases of Peter Betres, Anthony Just,
21 Albert Coffey, those three as to which Counts Three and Four
22 remain unresolved, and Ronald Betres, as to Count Four, remains
23 unresolved, since he's not charged in Count Three, I'm going
24 to inquire of you through your foreman -- and he need not respond
25 this instant, I'll take up in just a moment how I think a

1 response might be furnished -- I'm going to inquire of you as
2 a group through your foreman whether it is your view that as
3 to any of the counts in those four cases that remain unresolved
4 a deadlock remains, and that further deliberations would not,
5 in your judgment, be useful, or whether as to any of the counts
6 in those four cases it is your view that further deliberations
7 might well be of some use?

8 Let me make make clear what I'm not asking for. I
9 do not want to know the nature of the division, I don't want to
10 know any count, I don't want to know any detail of that sort at
11 all. Those matters are entirely within your own province and
12 are matters for you alone. But I think it would be useful to
13 know whether it is your judgment on any of the unresolved counts
14 in those four cases whether it is your view that further
15 deliberations would not be useful and that, in effect, the
16 deadlock remains, or whether, in your view, further deliberations
17 might be useful.

18 I am going to make the inquiry of the foreman and
19 leave it to him to determine whether he is in a position now to
20 respond, if he wishes to, or if he thinks it might be
21 appropriate for you to reconvene as a group and collectively
22 formulate his reply. You can do it either way you like, Mr.
23 Foreman.

24 THE FOREMAN: I believe that further deliberations
25 will be useful.

1 THE COURT: All right. Well, in that event, I'll
2 simply let you retire and resume those deliberations.

3 (Jury left courtroom at 10:59 a.m.)

4 THE COURT: All right.

5 MR. BOWMAN: We accept the foreman's response.

6 MR. CLIFFORD: Thank you for reminding them that
7 I'm still in the case.

8 THE COURT: All right.

9 (Recess taken.)
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AFTERNOON SESSION

1
2 THE COURT: In the Shelton case, gentlemen, there's
3 a note from the jury that -- report that they've reached verdicts
4 on P. Betres and R. Betres, so I'll have those returned, and
5 then I expect to recess then as well, since I think an early
6 start tonight is probably a good idea for all of us.

7 (Jury entered courtroom at 4:35 p.m.)

8 THE COURT: All right, ladies and gentlemen, your note
9 reports you've reached additional verdicts, and I will ask
10 the foreman to hand those to the Clerk.

11 All right, ladies and gentlemen, let me read these
12 to you to be sure that they accurately reflect the verdicts you've
13 rendered.

14 In the case of United States against Peter Betres, as
15 to Count Three, guilty; as to Count Four, guilty.

16 In the case of United States against Ronald Betres,
17 as to Count Four, not guilty.

18 Are those your verdicts?

19 (Jury answered in the affirmative.)

20 THE COURT: Requests of the jury in connection with
21 these verdicts?

22 MR. SAGARIN: I'll ask the jury be polled, your Honor.

23 THE COURT: All right.

24 (Each juror, upon being asked by the Court, "Are
25 those your verdicts?", answered in the affirmative.)

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1 THE COURT: All right, ladies and gentlemen, I see,
2 since you have your hats and coats on, that you expect to
3 leave, and since the driving is probably still not returned
4 to normal, it will probably be a good idea that you get an
5 early start this evening so you are excused for the evening.
6 I'll expect you to return at ten in the morning.

7 Again, please observe scrupulously the cautions I've
8 given you about not discussing the case, not reading any
9 accounts of it, especially since it is inevitable that the return
10 of a verdict prompts some sort of newspaper article, so please
11 be very careful not to just look at all of the newspapers since,
12 as I say, there's just bound to be some report, and it would
13 be just as well if you just have no contact with any newspaper
14 account, particularly during the time you are deliberating, so
15 with those cautions, the jury is excused until ten o'clock
16 tomorrow morning.

17 (Jury excused at 4:40 p.m.)

18 MR. DORSEY: With the conclusion of the cases insofar
19 as Ronald Betres and Peter Betres is concerned, if your Honor
20 please, I understand your instructions to hold off any action
21 on the bond situation, and I make no request at this juncture,
22 except to bring it to your attention.

23 THE COURT: What is the situation both in this case
24 and --

25 MR. NEIGHER: Your Honor, with respect to the defendant

1 Ronald Betres -- is presently under \$25,000 ten federal bond, and
2 in the state charge, he is under \$50,000 corporate surety bond.

3 MR. SAGARIN: Your Honor, in the -- in this action,
4 the Court will recall that the bond was originally set here at
5 \$50,000 and a ten percent bond, and then was reduced to \$50,000
6 -- to \$25,000, of which the ten percent is in the court. In
7 the state case, the defendant Betres' bond was set at a hundred
8 thousand dollars with corporate surety, which was filed and
9 posted; the bond was then reduced to \$50,000 with corporate
10 surety, but I'm not certain that the papers causing the
11 reduction have been cleared with the court, so that at least
12 it is \$50,000 with corporate surety, and the most is a
13 hundred thousand with corporate surety.

14 The reduction, the Court will recall, was prompted --
15 in both instances was prompted by the fire at the defenant's
16 hotel which was uninsured, whi n largely stripped him of property
17 value. For other than the properties which make up the -- the
18 rest of his properties make up the corporate surety bond.

19 I don't think there's any motion on a change of the
20 bond. If there is, I'd like to be heard.

21 THE COURT: There's no specific motion. I take it
22 there's a suggestion that I reconsider the situation.

23 MR. BOWMAN: Yes, your Honor, and I am frank to say that
24 I really find it difficult to make a recommendation in view of
25 the situation with any specificity.

1 MR. SAGARIN: Your Honor, I think in this case, we
2 have a bit unusual case. I suppose there are really two factors
3 the Court wants to consider, and that is: is there any likelihood
4 -- what's the likelihood of the defendant not appearing, and
5 I don't know of anything that would -- because I don't know of
6 anything that would indicate the defendant poses any danger to
7 any person or to any community. We have a situation here
8 where not only has the defendant been commuting back and forth
9 from Pennsylvania to this courthouse where he really had a
10 much lesser bond than in the state court, which is a \$50,000
11 surety bond, but also we have a situation where he's been
12 commuting after he was convicted on two counts. It seems to me
13 there is just no realistic likelihood that the defendant's not
14 going to appear. His entire property's tied up in the bonds
15 in the state court, he's got family, he's got business, he's got
16 ties to the community, he's got a wife, he's got two children
17 he supports, he's got a brother, he's got a sister who happens,
18 at the moment, to be in serious situation in a Pittsburgh
19 hospital, very close sister, lives in the same house he does.
20 She's in a kidney transplant situation. When he leaves here on
21 weekends, that's where he goes to see. Very strong family ties,
22 and he's got children who live in the northeast, so I don't think
23 there's any realistic likelihood that the defendant's not going
24 to appear at any time, nor is there any substantial likelihood of
25 any risk to any person or -- people who worked for him testified

1 against -- many other witnesses testified, they were long
2 known to have -- testified -- and I don't think even the govern-
3 ment has any concern on that regard.

4 So I would ask that the bond be continued. Certainly,
5 it seems fair, at least pending a presentence report. The
6 defendant's background and his ties, he does have the state case
7 which is pending and obviously has all of his assets tied up. I
8 can represent to the Court the fire at the hotel has serious
9 financial effect on the defendant. It was uninsured, and the
10 result of that is really almost everything the defendant owns
11 in the world is tied up in the bond in the state court, and
12 he's got family who are also responsible on that bond. He comes
13 from a long history of very close family, and he's just not
14 about not to show up somewhere, just really no chance in the
15 world that the defendant is not going to show up, aside from the
16 fact that, anyway, he'd be so easy to find, he doesn't exactly
17 melt into the crowd, so I really think an appropriate case to
18 continue the bonds, which are clearly not insubstantial bonds,
19 in this case, giving federal and state, I would think that if
20 for some reason the state bonds were discharged, it would be an
21 appropriate thing for the government to suggest that maybe
22 there ought to be some more bond in the federal case, but
23 there's no realistic likelihood at this moment of those being
24 discharged.

25 MR. DORSEY: From a factual point of view, I have

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1 nothing to contradict what Mr. Sagarin has said, if your Honor
2 please.

3 MR. NEIGHER: If your Honor please, I also request
4 that the present bonds that I earlier noted to the Court be
5 continued. Mr. Ronald Betres has been, like Peter Betres,
6 commuting back and forth regularly, and to my knowledge, has
7 never failed to appear in court in this court or in any state
8 court proceedings.

9 The federal and state bonds presently posted by
10 Mr. Ronald Betres are rather substantial. Mr. Betres is also a
11 family man, having a wife, two children, having had steady
12 employment for the past ten years in the Town of Butler,
13 Pennsylvania. His brother-in-law is an assistant district
14 attorney in that town. Another brother-in-law is a city councilman.
15 I don't believe that there's any suggestion by the government
16 at this stage or at any time that Ronald Betres poses a threat to
17 public health or safety.

18 He has been acquitted on the more serious ten-year
19 count this afternoon, and at least pending the presentence report
20 in this court, I would ask that the present bonds be continued.

21 THE COURT: Well, in the case of Ronald Betres, the
22 present bond may continue, of \$25,000 with ten percent cash
23 deposit.

24 I don't think that's the appropriate bond after
25 conviction in the case of Peter Betres, and the bond in his case

1 is increased to \$100,000 with corporate surety.

2 MR. SAGARIN: Your Honor going to set some reason for
3 that other than the potential sentence?

4 THE COURT: Well, I'm not treating it as a 3148 case,
5 but I think the circumstances, even under 3146 obviously
6 change somewhat after conviction. He now faces sentencing
7 on counts that carry significant maximum exposure, and I just
8 don't think that the fact that there's \$2500 on deposit is the
9 type of security that ought to be the assurance that a person
10 who has been found guilty on these counts will return.

11 I appreciate there's a state bond, but the concerns
12 that face me at the moment are federal concerns. I don't know
13 how significant the state concerns are. The federal concerns
14 are here and now. He stands convicted on these counts, the
15 exposure is clear, and I simply don't believe the fact that
16 he's put up \$2500 provides the type of assurance that there
17 ought to be, and I think in view of all the circumstances,
18 a hundred thousand dollars is an appropriate post-conviction bond
19 for someone to be under pending an appeal.

20 MR. SAGARIN: Your Honor, I think that the Court said
21 it's not acting under 3148. I think the only provision to act is
22 under 3148, and that's specifically -- deals with --

23 THE COURT: In the sense that it cross references
24 46, obviously, 3148 is the number, but in the absence of threat to
25 the community, it incorporates the standards of 3146.

1
2 MR. SAGARIN: Then, I take it -- what I'm asking your
3 Honor is that obviously if it's a ruling that has to be appealed
4 that there be some finding, or at least in the absence of some
5 finding, I take it the Court's basic ruling is simply that
6 because of the exposure on the counts, a hundred thousand dollars
7 bond is justified. Because there really seems to be no contrary
8 evidence that the defendant will appear, particularly in view
9 of the state court bond, which is not an unrelated case, it's
10 the same case for the same kinds of -- actually -- in Peter
11 Betres' case, for the exact same acts, and I would like the
12 Court to -- if that is the reason, I'd at least like to know
13 it on the record so that we can present a clear picture to the
14 appellate court, if that's necessary.

15 THE COURT: Well, I think the picture is pretty clear.
16 I'm not making a finding under the danger to the community
17 standard of 3148, I am making a -- making my determination on
18 assuring his reappearance based on the fact that he now stands
19 convicted of these four counts, the exposure he faces. I don't
20 want to comment on what he's been found convicted of while the
21 jury is still deliberating on other matters, but I think it is
22 obvious that I'm considering the totality of the circumstances
23 which are of record in this proceed. I just prefer not to
24 characterize them lest that be misconstrued by any juror who might
25 inadvertently see it.

MR. SAGARIN: Your Honor, I would ask that the Court --

1 that at least the Court's ruling on this be stayed for a few days
2 so the defendant can go back and see his sister, who is in the
3 hospital in a critical state of health. She's had a kidney
4 transplant operation, and then he report to the Court, either
5 with the bond or without the bond, within a few days.

6 THE COURT: How long has she been hospitalized?

7 MR. SAGARIN: She went into the hospital, your Honor,
8 I believe, two weeks ago. In fact, probably less than two weeks
9 ago. She was on the critical list, and then she had a -- she
10 was put on the dialysis machine, and she's currently in the
11 hospital. Defendant advised me this morning that she was in a
12 critical state of health. She's very close to him. They have
13 lived in the same house for a number of years. I think the
14 defendant can explain it, but she is there now, and she is in
15 a serious condition. He told me this morning when he came in
16 that she was in critical condition. I talked to his brother last
17 week, who was going to see the sister in the hospital. I think
18 the defendant would like to see his sister.

19 THE COURT: When did he last see her?

20 MR. SAGARIN: Saturday. He drove up here on Sunday.

21 THE COURT: All right. I'll stay the increase in bond
22 until Monday.

23 MR. SAGARIN: Thank you, sir.

24 (Court adjourned at 4:55 p.m.)
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

-----X
:
UNITED STATES OF AMERICA,
:
vs.
:
CHARLES D. MOELLER, et al.,
:
Defendants.
:
-----X

Criminal N-75-59

New Haven, Connecticut
February 4, 1976

B e f o r e :

Hon. JON O. NEWMAN, U.S.D.J.

And a Jury of Twelve

1 (2:45 p.m.)

2 THE COURT: The jury's note that came in this morning,
3 which I have shown to counsel, states: "Request to hear the
4 testimony of FBI's handwriting expert with regard to the
5 receipt of the rented Avis truck, Government Exhibit 32."

6 Now, that seems to concern only Mr. Bowman's client,
7 so I had asked him to review with the court reporter, and the
8 government was invited to participate, to try to narrow down
9 that portion of Mr. Gillham's testimony that was responsive
10 to that request.

11 MR. BOWMAN: Your Honor, there is a possibility of
12 some confusion. Exhibit 32 is the rental agreement, and
13 Exhibit 120 is the inspection slip which the jury may think
14 is a receipt, so I would ask that the Court make inquiry
15 of the jury of whether or not they are talking just about
16 the rental agreement.

17 MR. DORSEY: Is there any differentiation as to the
18 extent of the testimony? My recollection is that even though
19 it was perhaps before the final admission of the inspection
20 certificate into evidence that there was covered in the
21 testimony of Mr. Gillham his examination of both the contract
22 itself, which is 32, and the receipt, which I think was --

23 MR. BOWMAN: Here's what I would like to suggest, and
24 that is in the event they just want to see the rental agreement,
25 that I think we ought to excuse them because I don't think Mr.

1 Gale is at all clear about where he should start and stop.
2 Most specifically, with respect to the enlargements that Mr.
3 Gillham testified to with respect to both Exhibit 32 and
4 Exhibit 120, so that in the event they want to hear about the
5 rental agreement, then I think that we are going to have to go
6 through the enlargement testimony that Mr. Gillham gave and
7 decide what pertains to 32 and what pertains to 120.

8 I don't think it's that difficult at all. It may be
9 just going to a point in the reporter's notes where he knows
10 where to start and where to start and stop.

11 That's a suggestion I would make to the Court in the
12 event the jury foreman, or whoever, says that they just want
13 to hear about the rental agreement itself.

14 THE COURT: I will make some inquiry of them. I am
15 inclined to think to try to make that division is not a very
16 appropriate response, but let's see what their response is
17 first.

18 (Jury entered courtroom at 2:50 p.m.)

19 THE COURT: I have your note which reads: "Request
20 to hear the testimony of the FBI's handwriting expert with regard
21 to the receipt of the rented Avis truck, Government Exhibit 32."

22 Now, I have had the court reporter locate his notes,
23 but before determining what he should read to you, your note
24 creates an ambiguity for me which perhaps can be readily
25 dispelled.

1 You refer to the receipt of the rented Avis truck,
2 and then you refer specifically to Government Exhibit 32.

3 Now, there are two documents that, according to
4 the testimony, have some relationship to the Avis truck. One
5 is the rental agreement, and one is the inspection slip. I am
6 not sure whether you use the word "receipt" to mean one of those
7 or in particular, or whether you just meant the Avis documents.

8 You do refer to Exhibit 32. 32 is the rental
9 agreement. 120, I think it is, is the inspection document.

10 The witness whose testimony you have asked for
11 gave some testimony about each document, so what I need to know
12 from your foreman is: do you want us to read to you only what
13 he said about the rental document, or do you want us to read to
14 you what he had to say about the signatures on both documents?
15 Is that something that you feel you can refer to?

16 THE FOREMAN: Both documents.

17 (Testimony of Gillham read to jury by the
18 reporter.)

19 THE COURT: I should make another thing clear,
20 otherwise, you won't understand a reference. There are, in fact,
21 three documents, but one is simply a carbon of the other. 120
22 is the inspection document, 32 and 32A are the rental contracts,
23 32A simply being a carbon copy of 32, so it may be that some
24 of the questions and answers you will hear which will refer to
25 three documents, so I thought I should make that clear so you

1 will not be surprised at that reference.

2 (Testimony of Gillham read to jury by the
3 reporter.)

4 (Jury left courtroom at 3:25 p.m.)

5 (Jury entered courtroom at 5:10 p.m.)

6 THE COURT: Ladies and gentlemen, you have indicated
7 that you wish to adjourn at five o'clock, and it's now just a
8 few minutes after that, so we will recess for the evening.

9 Again, as I have repeatedly cautioned you during
10 these adjournments during deliberations, please scrupulously
11 abide my caution not to discuss the matter with anyone at
12 home or anywhere else, and to avoid any newspaper account,
13 television, radio, if there should be, anything of that sort
14 at all.

15 When you resume tomorrow, wait until all twelve are
16 assembled before you begin your deliberation.

17 Jury is excused until ten o'clock tomorrow morning.

18 (Jury excused at 5:10 p.m.)

19 MR. CRAIG: This marks the end of the third week of
20 jury deliberation, and although the Gurney jury may well have
21 gone six weeks, I am not sure that there was any indication
22 that there was a juror in that jury that had medical problems
23 of the kind that have come to the attention of this Court,
24 and for that reason, I would move that a mistrial with respect
25 to Mr. Just be declared.

1 MR. BOWMAN: I also move for a mistrial. I join and
2 adopt everything Mr. Craig has said.

3 I also move that we should have a medical report from
4 Mr. Pond's doctor, his physician, to determine whether or not Mr.
5 Pond has been in the physical condition which may have impaired
6 his free will and his ability to act independently in the
7 jury room.

8 MR. CLIFFORD: On behalf of the defendant Michael
9 Tiche, I join in that motion. I am not too sure that the Gurney
10 jury ever expressed they were deadlocked as this jury has.
11 That may be another distinction.

12 THE COURT: AS I reckon it, this is the 13th day that
13 they have deliberated for all or part of a day. It's true
14 that's lasted over a period of days, but the net result is it's
15 still 13 days on a case involving nine defendants. That's a
16 long time, but it's a long case, a lot of defendants, and I don't
17 think it's anywhere like an excessive period of time.

18 I appreciate they reported a deadlock as to two
19 counts in four cases. They indicated, when asked, that they
20 did think further deliberation would be useful. In one instance,
21 that produced an acquittal.

22 It seems to me the jury is proceeding very
23 conscientiously doing it step by step, pretty obvious from their
24 question today that they are focusing on one count of one
25 defendant and as to a particular element, and when a jury

displays that type of careful focusing of attention, it doesn't seem to me that there is any basis to think the time is not being well used.

As far as the situation concerning the request about Mr. Pond's health, it seems to me that to really start making medical inquiries is not the appropriate thing to do. He did indicate on an occasion he was not feeling well and wanted to go home, and I let him go home, I let the jury go home that day, and the only other occasion was that he said he wanted to leave early to keep a doctor's appointment, which he did.

It seems to me he has demonstrated that if there is any kind of a problem, he writes a note and tells me, as he did when he wanted to go home that day, the day he did not feel well.

I think that I am going to leave it on that basis that he indicated that he is not reticent about telling me if there is a problem. One day there was, he had seen his doctor, it just seems to me inevitable if his doctor had told him, "You should not be on a jury," he would have given me that note the very next occasion, and he hasn't done that. So I think the situation is one that I should leave in the first instance to him. If he alerts me to a problem, I will take it up with counsel, but on the present state of things, I don't think I should be exploring affirmatively his health situation. Certainly, from all appearances, he is sitting in the jury box

and not visibly in any problem.

I appreciate that if I asked any of them, "Do you find this a strain?", they would say yes.

Counsel have not found this an easy situation. Particularly since he has indicated that on the one occasion when he did not feel well, he promptly wrote out a note and said so. Had that situation lasted, I would be concerned, but I think it was the very next day we were back in session and he indicated no discomfort at all.

So I think on that situation, I will just leave things, and if he alerts me to a problem by communication, I will take it up with counsel.

(Court adjourned at 5:15 p.m.)

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UNITED STATES OF AMERICA, L
:
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vs.
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:
CHARLES D. MOELLER, et al.,
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:
Defendants.
:
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New Haven, Connecticut
February 5, 1976

And a Jury of Twelve

(11:40 a.m.)

THE COURT: All right. Now, gentlemen, with reference to the Shelton matter, the Clerk's office told me this morning that Mr. Pond had called to say he was not feeling well, and at that point I assumed that when the rest of the jurors came in I would tell them that they would not be in session today, and then take up with counsel at that point what relief, if any, they would seek.

Now, before that happened, in other words, in the interval between the time he called to say he was not coming and ten o'clock, when the others were due, he called again, and informed the Clerk's office that he was coming.

The next development of significance is that he's just arrived. So you are now up to date on the facts.

Knowing that counsel yesterday were pressing for some inquiry as to whether he had a -- any health disability that would interfere with the proper performance of his duties, I anticipated that you would renew that request this morning, and so I told the Clerk's office that when he came in, instead of having him report for deliberation, he should wait until I could take this matter up with counsel. That message was not given to him. He was just told to wait. And he is now waiting in my chambers.

Again, assuming that you want that inquiry pursued, I'm perfectly willing to make it. But I'll hear you as to your

views on the matter.

MR. CLIFFORD: We have just a minute, your Honor?

THE COURT: Yes.

MR. DORSEY: I have no objection to an inquiry being made.

MR. CRAIG: On the state of the record now, your Honor, on behalf of the defendant Just, I would move for a mistrial. It seems clear that he's one of the jurors having a -- severe medical problems, and has difficulty carrying out the functions of a juror and going along with the regular schedule for deliberations in this case.

So the threshold motion by defendant Just is at this point that a mistrial be declared in the case. I think other counsel join in that.

MR. BOWMAN: Defendant Coffey joins in that motion, your Honor.

MR. CLIFFORD: Defendant Michael Tiche also joins.

MR. CRAIG: I think it was pointed out by Mr. Sagarin some days ago that this is the kind of condition that is probably aggravated by stress, it's also a condition that is usually accompanied by a great deal of pain and discomfort.

For those reasons, and for the apparent inability of Mr. Pond on a regular basis to meet with his co -- fellow jurors to continue the deliberations in this case, we would move for a mistrial.

THE COURT: Well, I understand you've made the motion now. I do think that it is appropriate to know as much about the situation as can be readily learned at this stage, so I'm inclined not to even consider any other relief until we've considered the question of whether some inquiry ought to be made.

MR. CRAIG: Have you denied our motion at this point?

THE COURT: No. I'm just going to defer ruling on it. It obviously isn't being granted right this instant, but I think it is more appropriate to defer a ruling until we have a better basis to know which way to rule.

MR. CRAIG: It is the position of defendant Just, your Honor, that there's sufficient evidence on the record now. --

THE COURT: Yes, I understand.

MR. CRAIG: -- to have that motion granted, and we would request that it be granted now.

Assuming that your Honor does not grant it, I would request that a further inquiry be made of Mr. Pond's condition along lines that we've discussed, and we have a number of questions that we'd request be asked of Mr. Pond. I'd like to propose them to the Court.

THE COURT: All right.

MR. CRAIG: One: is Mr. Pond in any pain or discomfort? Two: is Mr. Pond taking any medication for his medical problem? If so, what kind and how long has he been on

that medication? Three: is his medical condition in any way influenced by the deliberations that he's participating in? Four: is he aware that he can withdraw as a juror for reasons of medical health? And that he need not -- that he is not compelled to continue his deliberations? Has he discussed this condition with his doctor and has his doctor advised him not to continue deliberations? Six: has he discussed his medical problems with his fellow jurors? And seven: does his medical condition prevent him from exercising -- from carrying out the functions of a juror in this case?

MR. BOWMAN: Your Honor, with respect to the last question, the wording that I, on behalf of the defendant Coffey -- just for the record, I join in with the position of Mr. Craig with respect to the motion for mistrial, but just with respect to the last question, I would ask that the following be asked: does his physical condition prevent him from coming to his own independent judgment on the cases before him?

MR. CLIFFORD: Defendant Michael Tiche joins in that request, your Honor.

MR. DORSEY: As I indicated earlier, your Honor, I have no objection to an inquiry being made as to the man's state of health, and I am sure -- I take no position as to how the Court actually asks the questions without presumably intruding on his personal privacy and, of course, doing so in as innocuous a fashion as possible, but I do take exception to,

and would object to, any inquiry that suggests to him that he's not compelled: that is, it is within his right to walk away as a jury. I think that that's the Court's determination based upon the factual situation.

Obviously, if he wishes to express some feeling about his physical capacity, that's perfectly appropriate, but I don't think that it should be put to him on a basis that he is not compelled to continue to function as a juror. I don't think that the question should be put to him as to whether his physical condition prevents his continued functioning and deliberating and rendering his own independent judgment. That's obviously not been the case up to the present time.

I think what the physical facts -- surely, should be explored, but to couch it in terms of asking him his judgment as to whether he is incapacitated from functioning as a juror, I think, is an improper inquiry.

I also don't think it is appropriate to ask him whether he's discussed his physical condition with the rest of the jurors. I don't see that's relevant at all.

Other than that, I have no problem, however your Honor wants to make the inquiry.

MR. CRAIG: I would suggest, your Honor, that the inquiry that we proposed be made of Mr. Pond in chambers, but that it be on the record.

THE COURT: Well, that's the next thing I wanted to

take up with you, is procedure. I think it certainly is appropriate to do it in chambers rather than in open court. If there is a concern about adding unduly to the pressures on him, I think that minimizes them to some extent.

If counsel and the defendants wish to be present, I'll do it on that basis.

But I want to present that issue to counsel, because they may determine that it is a more useful inquiry without so many people. So while you have a clear right to be there, and your clients have a full right to be there, if you determine -- and you don't have to make this a joint determination -- that so long as the record is made, this is a proceeding you'd rather not be at, and particularly given the circumstance that he still may be a juror in pending matters, I just think you ought to make an informed judgment about that with your clients. But if you and your clients wish to be there, you have that right.

MR. CLIFFORD: We understand.

THE COURT: Do you want to discuss it with him?

MR. CLIFFORD: I think we do.

MR. BOWMAN: May we have a moment outside, your Honor?

(Counsel and defendants left courtroom.)

(Counsel and defendants present.)

MR. CLIFFORD: Your Honor, the record should note that on the last -- the question of procedure, there has been a

discussion by all counsel and all defendants, a joint discussion, as to the method of procedure, and it's been decided, your Honor, that the attorneys and defendants be present at the time of the hearing, but that -- and that -- by way of suggestion -- that it be explained to Mr. Pond that the hearing in chambers is for convenience, his convenience, rather than being held in the public courtroom. In other words, that the scene has just shifted. I think he's used to the lawyers and defendants being present at any important part of the trial, so this will be just another important part of the trial in your chambers.

THE COURT: All right. We'll convene in chambers right now.

(In chambers.)

THE COURT: All right. We have -- all right, just put on the record what's happening. I have asked Mr. Pond to come into chambers so that I could ask him a few questions in view of the fact that he gave to the Clerk's office some indication that -- at least raised the question about whether he was feeling well enough to participate today, and so that Mr. Pond will understand, I've invited counsel and the defendants to sit in on this because any part of the case is something they're entitled to sit in on.

I thought it was better to do it in chambers rather than in open court just so we'd be a little more informal and

in a relaxed setting for you, and that's why they're here, and that's why we're in chambers rather than open court. Okay?

MR. POND: Okay.

THE COURT: All right. Now, as I understand it, I just want to be clear about this, you indicated to the Clerk's office this morning that you thought you ought not to come in, is that right?

MR. POND: Uh-huh.

THE COURT: And then you called back and indicated you thought you could come in?

MR. POND: Yes. She asked me if I could try it, you know, try to come in, so I thought about it, and I figured I'll try it.

THE COURT: The first thing I want to know is how are you feeling right now?

MR. POND: Lousy.

THE COURT: You feel lousy. All right. You have some sort of ulcer condition, is it?

MR. POND: Yes.

THE COURT: Causes you what? Stomach pains of some sort?

MR. POND: It just makes you sick.

THE COURT: Nauseous feeling?

MR. POND: Yeah.

THE COURT: Or actually actively sick?

1 MR. POND: Both.

2 THE COURT: I see. All right. And you don't feel
3 so good right now?

4 MR. POND: No.

5 THE COURT: Oh. All right. So, I take it, you'd
6 prefer not to be part of any deliberation today?

7 MR. POND: I can still try it. I get sick, worse,
8 you know, I'll just send you a note, that's all. Put it this
9 way: I'd like to end it, you know. I can't finish if I'm
10 home.

11 THE COURT: Let me ask you a few other things.
12 First, are you taking medication?

13 MR. POND: Yes.

14 THE COURT: What sort?

15 MR. POND: I drink a lot of milk and I have some
16 medicine upstairs.

17 THE COURT: Some sort of pills?

18 MR. POND: No. Liquid form.

19 THE COURT: Liquid. The doctor prescribe this?

20 MR. POND: No.

21 THE COURT: You want to your doctor?

22 MR. POND: Mmm, I --

23 THE COURT: Did he give you any medication or any --

24 MR. POND: No.

25 THE COURT: -- or instructions at all?

MR. POND: No. He told me to drink a large glass of milk every half hour.

THE COURT: A lot of milk?

MR. POND: Yes.

THE COURT: Did he know you were a member of a jury?

MR. POND: No.

THE COURT: Did he tell you to avoid work or anything like that, or stay home?

MR. POND: No. No.

THE COURT: Didn't give you any instructions like that?

MR. POND: No. Some other doctor did, but it wasn't for ulcer.

THE COURT: What did that involve?

MR. POND: The hinge in the chest was broke.

THE COURT: Is that a recent matter?

MR. POND: No.

THE COURT: This is some time ago?

MR. POND: Yes.

THE COURT: That doctor told you not to work?

MR. POND: Yes.

THE COURT: How long ago was that?

MR. POND: Around three years ago.

THE COURT: But you went to this doctor the other day?

MR. POND: I was supposed to go. I didn't go.

1 THE COURT: , you didn't go?

2 MR. POND: No.

3 THE COURT: Oh, I see. Have you seen him at all in
4 the --

5 MR. POND: No.

6 THE COURT: -- in the recent weeks?

7 MR. POND: No. Because everytime I see him, he tell
8 me the same thing.

9 THE COURT: And what does he tell you?

10 MR. POND: Drink a large glass of milk every half
11 hour.

12 THE COURT: Let me ask you this: Do you understand
13 that if at any time during the deliberations you want to
14 request permission to go home, that you are free to make that
15 request?

16 MR. POND: Uh-huh.

17 THE COURT: Do you understand that?

18 MR. POND: Uh-huh.

19 THE COURT: You've made a request in the past, but
20 I want to be sure you understand that you can always make
21 that request. You do understand?

22 MR. POND: Uh-huh.

23 THE COURT: Let me ask you this, Mr. Pond: Have you
24 mentioned to other jurors that you haven't been feeling well?

25 MR. POND: Uh-huh.

1 THE COURT: Let me ask you your own view of this
2 situation. Do you think that if you did deliberate today,
3 whatever discomfort you are experiencing would make it
4 difficult for you to participate in jury deliberations?

5 MR. POND: Well, if it got any worse, I'll just send
6 you a note, you know. But, I mean it could be bothering me
7 for the next two years, twenty years, so I want to try to get
8 it done.

9 THE COURT: Well, that's another area that I want to
10 ask you about. I mean I'm sure any member of the jury you
11 know hopes that the proceeding will conclude, they don't want to
12 stay on the jury forever. I can appreciate that. But what I
13 want to know is whether or not you feel, in your own mind,
14 that you would be doing anything in that jury room in order to
15 bring the proceeding to an end?

16 MR. POND: No. No way.

17 THE COURT: Is there any doubt of that in your mind?

18 MR. POND: No, not after yesterday.

19 THE COURT: Not after what?

20 MR. POND: Not after yesterday.

21 THE COURT: Don't tell me whatever discussion went
22 on in there, because, frankly, that's none of my business, and
23 I don't want to know that. I take it that's what you are
24 alluding to, there was some sort of discussion?

25 MR. POND: Yes, there was a good discussion.

1 THE COURT: Well, that's the jury's business, and
2 I don't want to intrude into that. But I do want to know
3 whether you have any concern at all that even the way you are
4 feeling now, not -- obviously, you said if you feel worse,
5 you'll tell me, but, obviously, you're not in perfect health
6 at the moment. That's clear, isn't it?

7 MR. POND: Uh-huh.

8 THE COURT: All right. I want to understand whether
9 you think, from your own standpoint, that you would do anything
10 in that jury room, either feel you should say something or feel
11 you should not say something, or feel you should cast a vote
12 or not cast a vote, would you do anything in order to end
13 the proceedings and get home? That's what I want to know.

14 MR. POND: You mean just give in to 'em?

15 THE COURT: If there's a division.

16 MR. POND: Yeah.

17 THE COURT: And I don't even want to know what it is
18 or who's on what side.

19 MR. POND: No.

20 THE COURT: I don't want to know anything about that.

21 MR. POND: No.

22 THE COURT: You don't think you would?

23 MR. POND: No.

24 THE COURT: Do you think your situation, your health
25 situations, makes it at all difficult for you to form your

own judgments and express your own views?

MR. POND: Unh-unh.

THE COURT: Doesn't impair that?

MR. POND: As a matter of fact, it makes it better.

THE COURT: Well, if it were left entirely up to you, what would your preference be right now? To go home or to resume deliberating?

MR. POND: I'm going to try it.

THE COURT: Deliberating?

MR. POND: Yeah.

THE COURT: All right. Let me excuse Mr. Pond for just a moment. Would you just wait outside there for just a few minutes, please?

(Mr. Pond excused from chambers at 12:15 p.m.)

THE COURT: Well, first, is there anything else you want to ask? I think in one form or another I covered all your questions.

MR. CRAIG: The only question that I recall asking you to ask that you may not have asked was whether he realized he was not compelled to carry on deliberations as a juror.

THE COURT: Well, I put it in terms of whether he knew he could always ask, and which I really thought was the more accurate inquiry, and he -- obviously, he has understood in the past and understands today.

MR. CRAIG: You didn't ask, your Honor, whether the

1 deliberations influenced his condition in any way, whether
2 he, in effect, has had this condition all the way through the
3 three weeks plus that they've been deliberating, or whether
4 it is, in fact, been aggravated or --

5 THE COURT: Well, we know that on a previous day he
6 wanted to go home. You know, to have him expound on the
7 medical theories, I don't think would be very useful.

8 MR. CRAIG: Just trying to recall the question I
9 think --

10 MR. BOWMAN: But he would know if his condition were
11 aggravated after a day of deliberation.

12 MR. CLIFFORD: It's obvious that it has been.

13 MR. CRAIG: His physical appearance certainly has
14 changed, your Honor, in the last few weeks.

15 THE COURT: Well, I'll tell you what -- the concern
16 I have. He obviously is not in the best of shape, but it is
17 his view that he can continue and, moreover, he'd like to.
18 There's obviously a risk that the longer the deliberations
19 go on that he finds he can't continue, either for a day or for an
20 extended time.

21 Now, there are different matters pending before that
22 jury. There's one case on which they've done nothing. There
23 are two cases in which they've returned two verdicts and said
24 they're deadlocked on two other counts.

25 MR. CLIFFORD: They have not returned a verdict, we

1 don't know whether --

2 THE COURT: I meant in terms of result.

3 What I'm certainly considering is granting mistrial
4 motions in the Just and Coffey cases as to two counts that
5 have been pending for some period of time since the deadlock
6 was reported. Put an "s" on deadlocks, will you, please? My
7 grammar. I'm concerned lest the jury misinterpret that action.

8 With respect to the Michael Tiche case, although I do
9 think it is appropriate that they consider the Michael Tiche case
10 and either tell us they can't resolve it or tell us they can
11 resolve it -- and I certainly don't want to give them any time
12 limit, and I assume counsel doesn't want them to have any
13 time limit. Maybe you do. I don't know whether that's something
14 you thought about. I should say to them, "Look, if you can
15 return verdicts, fine; if you can't, that's fine," and give
16 them a limit. I assume that was your preference, but I don't
17 want to rule without your having a chance to be heard.

18 MR. CLIFFORD: I want a mistrial. Now.

19 Part of the problem, your Honor, if I may -- I don't
20 mean to interrupt -- part of the concern I have is that the
21 other jurors are very much aware of this condition, and I don't
22 know enough of the dynamics as to what took place inside a jury,
23 and I don't know what kind of pressure they can bring to bear,
24 and I -- I understand his responses and everything else, but I
25 just -- I'm very leery of that kind of a situation. I don't

1 know any more than you do about what's going on inside that
2 jury room, but aside from the effect on himself, I'm concerned
3 about that -- last night he looked terrible, and this morning
4 he looks terrible, and he tells us he feels lousy, that's a
5 pretty descriptive word, and that condition's going to be known
6 to the other jurors, and may be a very sympathetic reaction to him,
7 and I don't know which way that cuts. On the other hand,
8 jurors can be pretty hard people, and I don't know which way
9 that cuts, either, and I am concerned about that kind of
10 pressure, not only by himself, that can be exerted by the
11 other jurors.

12 It's not like they've had this for just two hours or
13 two days, it's been a very, very long time, and if he's going
14 through this for this period of time, you know, it is not just
15 going to get any better, because they obviously have taken
16 care of what they see as the easiest part of the cases. The
17 situation from here on in isn't going to improve.

18 And I think on the state of the record, we're
19 entitled, or at least Michael Tiche is entitled to a mistrial.
20 It's 88 some odd hours. I don't even know how many hours
21 we've got.

22 Here's a man called in this morning, said, "I can't
23 make it," and he's implored by the Clerk's office to try. He
24 may be down out of some sort of sense of duty that is at present
25 conflict with his medical condition, and I don't want that kind

1 of person sitting on the fate of my client. I don't want a
2 jury with that kind of knowledge making decisions on my client.
3 I think that's a huge pressure to compromise, regardless about
4 what he says standing tall. I don't know which way the
5 compromise cuts, by the way, I'm saying that either way.

6 THE COURT: Well, I think I'm going to deal with it
7 this way --

8 MR. DORSEY: Before your Honor makes -- are you going
9 to make a definitive determination? I'd like to be heard briefly.

10 It seems to me that the only question at this juncture
11 is a twofold one: one, whether the man should be permitted
12 to continue deliberation participation now; and secondly --
13 and that will just simply be a matter whether you, in effect,
14 put the jury in recess for the rest of the day or not -- second
15 question is whether he would appear to be in the physical
16 condition that would preclude him from participating any
17 further, and that would be the question of whether or not
18 you would be predisposed to any motion for a mistrial, and it
19 seems to me that what he has indicated here -- of course, he's
20 got a physical condition, we know the nature of it -- I don't
21 understand how anybody can make the observations that he looks
22 good today, and he looks worse than yesterday, or whatever he
23 may look like.

24 The fact is that what he's indicated is that he is in
25 some degree of discomfort and having some difficulties, but

1 he is, according to his statement, able to proceed, and is
2 willing to at least try to proceed for the rest of the day.

3 Now, it seems to me that based on that, there is no
4 real foundation for a mistrial being granted, but rather
5 the Court should make a determination as to whether under some
6 apparent limitations he should be permitted to continue until
7 such time as he has done in the past, he indicate he just
8 simply can't continue.

9 To speculate what the other jurors might be doing
10 and thinking in relation to the cases under consideration by
11 virtue or in relation to his condition is such speculation that
12 I don't think that any determination should be made by the Court
13 on that basis, and that rather the determination should be based
14 solely on the question of how he answered the questions here,
15 which suggested to me that he ought to be permitted to continue
16 and that if and when he comes to, in his own mind, a determina-
17 tion that he really can't and shouldn't continue, that he, as
18 he has done in the past, would request, as he's aware he has the
19 right to do, termination, at least for that particular period
20 of time.

21 I don't think there is any distinction to be drawn
22 between the three cases based upon his present situation
23 insofar as whether he is permitted to continue to deliberate today
24 or if he is permitted to continue to deliberate at all.

25 The time of the deliberations, as far as the cases

1 concerned, you've got to remember there's 35 counts, the
2 deliberations have gone over, I think you said yesterday, 13 days,
3 which is something like six hours a day if you allow the hour for
4 lunch, and even if you assume that they continue on during
5 the lunch time, the fact is that it's no more than -- if you
6 average it out, a couple of hours per count, and it's obvious
7 that this jury is doing a very meticulous study of the
8 evidence in relation to all of the elements of each count, and
9 it seems to me that, clearly, they should be permitted to
10 continue to deliberate from that they -- apparent from what
11 his answers were yesterday -- there is a free give and take
12 going on up there, and they should be allowed to continue to
13 deliberate until such time as they indicate that they cannot
14 resolve the cases, and they haven't done that, at least as of
15 this moment, so it would be my position that they ought to be
16 permitted to go on deliberating until such time as he indicates
17 he's got a problem that keeps him from doing so, and that there
18 is no bar for the granting of the mistrial motions at this
19 time.

20 THE COURT: Well, I'm going to deal with it this way:
21 The juror is in some discomfort, that seems clear. It is his
22 judgment that he can participate, and it is his preference to
23 participate. Without even being prompted, he volunteers a
24 rather emphatic determination to be a genuine participant.
25 This isn't a situation of someone who gives the impression that

1 he's going to reluctantly go back to the jury room and fade
2 into the woodwork, and he volunteers rather emphatic comments.

3 So, I think it is appropriate for him to resume
4 deliberating.

5 I think I do need to give the entire jury a cautionary
6 instruction, lest they in any way misapprehend what they should
7 do in light of a question about his health. But I am concerned
8 about what issues ought to remain for their consideration.
9 Not because I don't think the jury with Mr. Pond cannot
10 fairly consider the remaining issues, but I'm worried that
11 if further time elapses, we run the risk that his health
12 situation worsens, and that they then don't ever get to the
13 Michael Tiche case for a chance to tell us whether they either
14 have verdicts or cannot reach them, and it is that risk of
15 a delay and an eventual inability to resolve the Michael Tiche
16 case that I think ought to be avoided.

17 Now, there's a situation here where it can be avoided
18 without any -- very much prejudice to any interests of the
19 government. The other two cases have resulted in convictions
20 on two counts. The jury has told us at one time they're
21 deadlocked on the other two counts. There's obviously some
22 interest the defendants have in being acquitted on those
23 counts, but they've seen fit to move for a mistrial, and I am
24 going to grant those motions, specifically to declare a mistrial
25 as to Counts Three and Four in the Just case and the Coffey case.

1 I am going to permit the jury to continue deliberating
2 in the Michael Tiche case, and I will bring them into court
3 now and give them a cautionary instruction.

4 MR. CLIFFORD: I guess this is the time to say some-
5 thing on the record. I'd object to that, your Honor. It is
6 clear invitation to them to get busy on the Michael Tiche
7 case, it's an indication from the Court that they may be
8 derelict in their duty in not doing so. I think it places me
9 in a discriminatory position, that I had the basis for a
10 mistrial, as has the other defendants, nothing has changed,
11 and I think the same factors apply to Michael Tiche as it does to
12 them, and I think I'm being discriminated in proceeding this way,
13 and I would object.

14 MR. DORSEY: May I ask you that you consider this?
15 I take it that at least partially your concern is -- or the
16 premise on which you are acting -- is that there has been
17 previously reported deadlock as to those two counts in each
18 of those two cases --

19 THE COURT: Well, that's certainly the basis in my
20 mind for considering the circumstances of the three cases
21 quite differently.

22 MR. DORSEY: Well, I wonder if your Honor would
23 consider before you actually grant those motions asking the
24 jury whether or not within some relatively reasonably short --
25 and maybe expressly short, if your Honor feels it appropriate

1 to ask it that way -- there can be a resolution of those cases
2 so that your Honor would know whether they seem to be fairly
3 close to a resolution of those cases or not, which I think is
4 an appropriate consideration in relation to the government's
5 position, for one, and the situation that Mr. Clifford has
6 raised, for another.

7 THE COURT: No, I'm not going to do that. I think
8 in view of the circumstances that have transpired, the time
9 they reported their deadlock, the instruction I gave them,
10 the further inquiry I gave them and the deliberations since
11 then, to make that inquiry now would run the serious risk of
12 being misinterpreted by them, despite whatever I say.

13 MR. DORSEY: The only trouble is that you gave them
14 the instruction that they were to deliberate further, and that
15 if they could not come to a conclusion, it's clear that they
16 have the option to state that. Now, they have not stated that.

17 THE COURT: I'm not suggesting they've changed their
18 mind, I've changed my mind, in effect, but I'm just now
19 confronted with other circumstances, and I am very worried about
20 they don't disable the jury from considering the Tiche case, but
21 they run the risk that if they delay by considering the other
22 cases and then we run into a health problem, that for reasons
23 unrelated to the merits of the Michael Tiche case, we don't get,
24 in this trial, at least, a resolution of those charges, and
25 that's a risk that I think it is inappropriate to take when all

1 that's being lost to the government is the chance in this
2 trial to secure conviction on remaining counts after two counts
3 have already resulted in conviction. I think the interests
4 of the government are slight in that balance, and the risk of
5 not resolving the Tiche case by a delay, and a subsequent
6 illness, are risks that just are not appropriate to be taken.
7 So that's what we're going to do.

8 MR. DORSEY: May I just point out, Judge, one last
9 thing? You say that there's no -- there's no risk, but the
10 fact of the matter is you don't know at this juncture whether
11 there is any potential immediate or early resolution of
12 the other two cases, which, of course, are going to present
13 no problem as far as the Tiche -- is concerned.

14 THE COURT: Well, it is true I don't know that. It
15 is also true that they have had about a day and a half since
16 that inquiry to report, and they have -- it is true they could
17 be on the verge of rendering verdicts, but I don't think I can
18 even make that inquiry at this point without it being
19 misinterpreted, so I won't do it.

20 (In the courtroom.)

21 (Jury entered courtroom at 12:45 p.m.)

22 THE COURT: All right. Good afternoon, ladies and
23 gentlemen. I brought you back to the courtroom to mention two
24 different matters to you.

25 First of all, I have decided to withdraw from your

1 further consideration the remaining counts in the Just and
2 Coffey cases: that is, Counts Three and Four, as to which no
3 verdicts have been returned. So you need not and, indeed, are
4 instructed not to give any further consideration to those two
5 counts in each of those two cases. I've made the decision to
6 withdraw those from you.

7 I suppose I should make clear that there's certainly
8 no feeling on my part that anything improper has happened, and
9 I wouldn't want you to think that. It has just seemed to
10 me that it was the appropriate decision for me to make that
11 those two counts should be withdrawn from your further considera-
12 tion.

13 Now, before you resume your deliberations, I want to
14 bring one other thing to your attention. The status of the
15 case is that there remains for your consideration the case of
16 Michael Tiche, as to which you've made no report at all, either
17 of verdicts or of an inability to reach verdicts, and so that
18 case remains for your consideration.

19 Now, this morning it came to my attention that one
20 of the jurors, Mr. Pond, wasn't feeling well, and subsequently
21 he indicated that he thought he -- while not feeling in
22 tip-top shape, by any means -- thought he was well enough to
23 resume deliberations, and I have discussed it with him in
24 chambers just now, and he indicates now that he believes he can
25 participate fully and resume deliberations, and so I'm going

1 to permit the jury to resume its deliberations.

2 But in doing that, I want to be very clear with you
3 on what I'm about to say. First of all, I've made it clear
4 to Mr. Pond that if during the course of the day or on any
5 subsequent day he does not feel well enough to continue
6 deliberations, that he should promptly send me a note to that
7 effect, because certainly he is not going to be required to
8 deliberate on a day when he doesn't feel up to it. Now, I'm
9 sure he wouldn't want that, and I am sure none of you would
10 want that.

11 At the same time, I don't want any juror, Mr. Pond
12 or the others, to do anything differently at all in the course
13 of your deliberations simply because you are aware that he's not
14 feeling well this morning. And, again, I don't want to explore
15 with you at all, and I don't want any response, as to the state
16 of your deliberations or anything of that sort, that's none of
17 my business, but I do want to be very clear with you that
18 nobody should be in any hurry to do anything simply because
19 you've now learned that Mr. Pond is not up to par this morning.

20 It is his judgment that he's able to participate
21 with you fully, and I respect his judgment along those lines,
22 and if he should feel under increasing discomfort, he'll send
23 me a note to that effect.

24 There remains for your consideration one case. If it
25 turns out that it is resolved, that's all right. If it turns

1 out is not resolved, that's all right, too.

2 There are no time limites, there are no deadlines,
3 and nobody in considering that case ought to do anything
4 different because of the number of days you've been in session
5 or for any other extraneous reason.

6 So resume your deliberations, but do so with the
7 same conscientiousness and, I am sure, fairness, that has marked
8 all of your other deliberations.

9 If you tell me that you have any verdicts, all right.
10 If at any point you tell me you think you cannot reach verdicts,
11 let me know that. But I want to again emphasize that you are
12 not under any time constraints, you are not under any
13 artificial deadlines, and quite specifically, I don't want
14 any juror, Mr. Pond included, to say to himself or herself:
15 well, I ought to make a quick decision in order to bring this
16 to an end. That wouldn't be fair to the government; it
17 wouldn't be fair to Michael Tiche; it wouldn't be fair to you
18 as jurors.

19 So on that basis, I'll simply ask the jury to retire
20 and resume your deliberations.

21 (Jury left courtroom at 12:50 p.m.)
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